

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 276

GENERAL ELECTRIC COMPANY, PETITIONER,

vs.

LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (U. E.)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

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**IN UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MASSACHUSETTS**

Clerk's Certificate to following transcript omitted in printing.

**LOCAL 205, UNITED ELECTRICAL RADIO AND MACHINE WORKERS  
OF AMERICA (UE),**

v.

**GENERAL ELECTRIC COMPANY**

(Telechron Department, Ashland, Massachusetts),

Civil Action No. 54-933-A.

**DOCKET ENTRIES**

**1954**

December 16. Complaint filed, summons issued.

December 27. Summons returned by pltf. attorney, service having been accepted.

**1955**

January 4. Stipulation and Order for extension of time for filing answer to and including January 17, 1955.

January 17. Defendant's motions to strike, to dismiss or for more definite statement filed with cert. of service.

February 4. Amendment to complaint filed.

February 21. Aldrich, J. Deft. motion to strike matter relating to damages,

February 21. Aldrich, J. Deft. motion to strike request for specific performance.

February 21. Aldrich, J. Deft. motion to dismiss.

February 21. Aldrich, J. Deft. motion for more definite statement, under advisement after hearing.

February 24. Aldrich, D. J. Memorandum filed. "The plaintiff may have until March 4, to file and amendment or a new complaint." Copies to counsel.

[fol. 2] 1955

March 3. Motion for extension of time for filing amended complaint to and including March 11th filed and assented to.

March 7. Aldrich, D. J. Motion for extension of time for filing amended complaint allowed.

March 10. Stenographic Record, ~~of February 21st~~ filed.

March 11. Amended Complaint for Specific Performance of Contract to Arbitrate and for Damages filed, with cert. of service.

March 22. Stipulation and Order filed regarding time in which the deft. may file its answer, or other pleading. Time extended to and including March 28th. Allowed by Aldrich, D. J.

Mar. 28. Defendant's answer filed with cert. of service. Defendant's motion to strike request for specific performance, filed with cert. of service.

March 28. Aldrich, D. J. Opinion filed.

April 22. Plaintiff motion for Final Judgment on Grant of Defendant's Motion to Strike Request for Specific Performance. Certificate of Service attached.

April 27. Aldrich, J. Pltf. motion for final judgment on grant of deft. motion to strike request for specific performance under advisement after hearing.

April 27. Aldrich, J. Memorandum filed. Counsel notified.

April 27. Aldrich, J. Order entered. After hearing, and in accordance with the Opinion handed down March 28, 1955 it is ordered that deft's motion to strike the pltf's prayer for an injunction is granted for want of jurisdiction, and a final judgment is entered dismissing claims for equitable relief.

April 27. Motion to amend amended Complaint, assented to, filed.

[fol. 3] 1955

April 27. Aldrich, D. J. Order of Dismissal entered for want of jurisdiction.

April 27. Notice of appeal filed by the plaintiff.

April 28. Copy of notice of appeal mailed to Francis J. Vass, Esq., 50 Federal St., Boston.

April 28. Original papers delivered to the U. S. Court of Appeals.

IN UNITED STATES DISTRICT COURT

COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO ARBITRATE AND FOR DAMAGES.—Filed December 16, 1954

Count I

1. Plaintiff is a voluntary unincorporated labor association which represents the employees of the defendant Company, employed in its Telechron Department plant at Ashland, Massachusetts in an industry affecting commerce. Plaintiff maintains its principal offices in Ashland, Massachusetts, where its duly authorized officers and agents are engaged in representing and acting for employee members.

2. Defendant is a corporation organized under and by virtue of the laws of the State of New York and doing business at its Telechron Department plant in Ashland, Massachusetts. It is the employer of the employees who are members of plaintiff Union, and is engaged in interstate commerce.

3. This action arises under the provisions of Section 301(a), 301(b) and 301(c) of the Labor Management Relations Act of 1947 (29 U.S.C.A. Sections 151, 185(a); 185(b) and 185(c)).

4. On June 29, 1953, plaintiff and defendant entered into a collective bargaining contract, which continued in effect until June 10, 1954, was modified on June 14, 1954, and, as modified, is in effect until September 27, 1955. Copies of these contracts are attached hereto and made a part hereof as Exhibits A and B and are referred to hereinafter as the contract. The contract provides in Article XIII thereof:

“1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishment of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company. The party desiring to arbitrate shall give the other written notice of its intention to arbitrate within thirty (30) days after the decision in Step 4 of Article XII is rendered unless this time limit has been extended in writing signed by both parties.

2. If the Company and the Union are unable to agree on the selection of an arbitrator within fifteen (15) days the Federal Mediation and Conciliation Service shall be asked to submit a list or lists of arbitrators from which one will be agreed upon.

3. The arbitrators shall hear and determine the dispute or controversy as promptly as possible and shall issue findings or award a decision in writing. The decision of the arbitrator shall be final, binding and conclusive upon the parties. Such decision shall be within the scope and terms of this Agreement and the authority of the arbitrator shall be limited to the interpretation, application, or determining compliance with the provisions of this Agreement but he shall have [fol. 5] no authority to add to, detract from, or in any way alter the provisions of this Agreement.

4. The cost of any arbitration shall be borne equally between the Company and the Union except each party shall pay the expenses of all witnesses called by it.

5. It is specifically agreed that no provision of this Agreement or other Agreements between the parties shall be subject to arbitration pertaining in any way to the establishment, administration, interpretation, or application of Insurance or Pension Plans in which the Employees are eligible to participate."

5. On April 2, 1954 plaintiff filed a written grievance with defendant that for a considerable time prior thereto employee Joseph Boiardi had been paid at a lower rate of pay than called for in his job classification; and that the defendant had not properly applied the contract in its payments to Boiardi. Thereafter plaintiff duly processed the said grievance in accordance with the grievance procedure of the said contract, without reaching agreement with defendant.

6. On June 10, 1954, plaintiff duly notified defendant in writing that, in accordance with Article XIII of the contract, it requested submission to arbitration of the Joseph Boiardi grievance; that it considered the Company's action to be in violation of the contract; and that it nominated a certain arbitrator.

7. On June 16, defendant notified plaintiff that it was

unwilling to arbitrate this matter. Thereafter, despite other requests by plaintiff to submit the matter to arbitration, defendant continued to refuse and still refuses to submit either the arbitrability of the grievance or the grievance itself to arbitration, in violation of the said contract, and to carry out its agreement to arbitrate as set forth in Article XIII of said contract.

[fol. 6]

## Count II

1. Paragraphs 1 through 4 of the First Count are hereby realleged and made a part of this Count.
2. On August 13, 1954, plaintiff filed a written grievance with defendant alleging that employee Charles Armstrong had been discharged arbitrarily and duly processed the said grievance procedure under the said contract, without reaching agreement with defendant.
3. On September 24, 1954, plaintiff duly notified the defendant that it was submitting to arbitration the Charles Armstrong grievance as a matter of application of the contract and would shortly submit the name of a proposed arbitrator and form of the question.
4. On September 30, 1954, defendant notified plaintiff that it refused to submit the said grievance to arbitration; and thereafter, despite renewed requests by plaintiff, defendant continued to refuse, and still refuses, in violation of said contract, to submit either the arbitrability of the grievance or the grievance itself to arbitration and to carry out its agreement to arbitrate as set forth in Article XIII of the said contact.
5. By reason of defendant's aforesaid refusal to carry out its agreement to arbitrate the said Boiardi and Armstrong grievances, and its aforesaid violation of the collective bargaining contract, plaintiff has been damaged in its collective bargaining relationship and its ability to represent and act as collective bargaining representative for employees and has been required to expend sums of money, and put to trouble and expense, which would not have been necessary, but for the aforesaid violations by the Company of the said contract.

Wherefore, plaintiff demands that defendant be required specifically to perform its agreement to arbitrate by sub-

mitting to arbitration the grievances involving Joseph Boiardi and Charles Armstrong, in accordance with Article [fol. 7] XIII of the said contract, (2) damages in the sum of three thousand dollars (\$3,000) (3) if specific performance is not granted, plaintiff have judgment against defendant in the sum of ten thousand dollars (\$10,000).

By its attorney, (S.) Allan R. Rosenberg, 10 Tremont Street, Boston 8, Massachusetts.

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## AGREEMENT

This Agreement made the twenty-ninth day of June, 1953, between Telechron Department of the General Electric Company (referred to as Company) and Local 205 U.E.R.M.W.A. (referred to as Union).

WHEREAS, the parties hereto desire to establish the standard of hours of labor, rates of pay, and other working conditions at the plants of the Company in Ashland, Massachusetts, and to regulate the mutual relationship between the parties hereto with a view to securing harmonious cooperation between the parties. Now, in consideration of the premises and the mutual covenants and agreements herein contained, the parties do hereby covenant and agree as follows:

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## ARTICLE I COLLECTIVE BARGAINING

1. The word "Employee" (Employees) as herein used will refer to the Company's hourly-rated production and maintenance employees at the Ashland Plants as set forth in the certification of the National Labor Relations Board in Case No. R-1348, including shipping and receiving clerks and group leaders, but excluding executives, foremen, assistant foremen, sub-foremen, factory, office, and administrative clerical employees, time study men, and all other individuals having authority, in the interest of the Company to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

2. The Company hereby recognizes the Union as the exclusive bargaining agent of its Employees as defined in the preceding paragraph for the purpose of collective bargaining.

3. The Union will in no way restrict the Employees in their efforts to improve the quality of work performed but to encourage the Employees to perform loyal and efficient work and will use its influence to promote the sale of the Company's products and will urge its members to assist in increasing production and lowering costs.

4. Neither the Union nor its members, agents, or representatives will intimidate or coerce Employees

at any time nor will it solicit members or conduct any Union activities during working hours other than those of collective bargaining and the handling of grievances in the manner provided.

5. The Company will not interfere with the right of Employees to become members of the Union nor will it use coercion, discrimination or restraint against any member of the Union on account of such membership.

6. The Company shall not give financial aid to or otherwise support any labor organization. This shall not be construed to prevent the normal exchange of information between the parties hereto in the normal course of collective bargaining such as the weekly report of personnel actions given to the Business Agent.

## **ARTICLE.II**

### **CHECK-OFF**

1. The Company agrees to deduct from the first pay of each month the monthly Union membership dues of all Employees who individually and voluntarily authorize the Company to make such deductions in writing. Until such written authorization has been revoked, the Company will continue to make the authorized deductions and remit them monthly to the Treasurer of the Union. The authorization for such Union dues deductions shall be in the following form:

"I hereby authorize and direct Telechron Dept., General Electric Co., to deduct from the first pay of each calendar month hereafter earned by me, the sum

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of \_\_\_\_\_ as the monthly membership dues of Local 205, United Electrical, Radio and Machine Workers of America. The sum so deducted shall be remitted to the Treasurer of the Union not later than the end of the month in which the deduction has been made.

This authorization may be revoked by me upon thirty (30) days written notice to Telechron Dept., General Electric Co., sent by registered letter, with a copy thereof mailed at the same time to Local 205 (UE) by individual registered letter.

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Clock No. . . . Date . . . . Signature of Employee"

2. The Union, may, upon thirty (30) days notice in writing to the Company, cancel the authorization of any individual Employee, group of Employees or all Employees.

## **ARTICLE III**

### **SERVICE CREDITS**

1. Eligibility of an Employee to participate in certain benefits shall be predicated upon the length of service accumulated by the Employee.
2. An Employee shall accumulate one weekly service credit for each week or part of a week worked. The total of such accumulated service credits, plus those allowed in accordance with paragraph 4, expressed in years and weeks, shall constitute an Employee's length of service, except as provided in paragraph 3 below.

3. Length of service for an Employee who was on the payroll as of May 1, 1939, will be the number of weekly service credits accumulated after that date as stipulated in paragraph 2 above, plus length of service as of May 1, 1939, calculated as follows:

The number of years and weeks the Employee was on the payroll minus the excess of all absences which exceeded six consecutive months.

4. Service credits will be allowed for the following periods of time not worked and such absence will not constitute a break in service except as stipulated in paragraph 6 below:

a. Absence due to personal illness when covered either by a doctor's certificate or an insurance claim and provided that the Employee so absent keeps the Plant Manager informed monthly.

b. Regular vacations.

c. Military or naval service.

d. Jury duty.

5. Service credits will not be allowed for the following periods of time not worked but such absences will not constitute a break in service except as stipulated in paragraph 6 below:

a. Layoff

Layoff because of reduction in force. An Employee so absent may accept temporary employment elsewhere.

b. Leave of Absence

Leave of absence without pay, not exceeding three months for any reason other than to seek employment elsewhere, may be granted in individual cases

at the discretion of the Plant Manager. In every such case leaves must be arranged in advance, reasons for leave given in writing, and a definite time established for the Employee's return to work.

6. Break in Service

Service shall be broken when an Employee:

- a. Leaves voluntarily or is discharged.
- b. Absents himself from work for two consecutive weeks or longer without satisfactory explanation.
- c. Fails to keep the Plant Manager informed monthly, or is absent for a continuous period of more than twelve months because of personal illness.
- d. Is not re-employed after a layoff because of reductions in force when such absence exceeds twelve consecutive months. Laid off, is notified within a year that he may return to work but fails to do so or give satisfactory explanation within two weeks of such notification.

7. If an Employee after a break in service is re-employed, he shall be considered a new Employee and his service shall be accumulated from the date of such re-employment, except if the Company re-employs an Employee whose service has been broken because of layoff for lack of work for more than one year, such Employee shall have his or her accumulated service credits restored, if such layoff did not exceed three years and if his length of service at the time of his layoff was greater than the total length of such layoff.

8. The Company will provide the Union with a copy of the service credit list within 30 days of its compilation.

## ARTICLE IV

### HOURS

1. The regular workweek for Employees shall be 5 days, 8 hours per day from Monday to Friday inclusive.
2. An Employee's workday is the 24-hour period beginning with his regularly assigned starting time of his workshift, and his day of rest starts at the same time on the day or days he is not scheduled to work. His workweek starts with the start of his regularly assigned work period on Monday of that workweek. Upon commencing work on Monday at a newly-assigned starting time, an Employee's preceding workweek shall end and the preceding day of rest of any Employee who has had a 24-hour period of rest prior to the newly-assigned starting time shall also end.
3. Exceptions to the above two paragraphs may be made to meet production requirements or unusual conditions.
4. Any Employee working overtime any one day shall not be given time off to offset overtime.
5. Employees shall be given a full ten minutes rest period in every four hours except when production schedules require a different arrangement.
6. The Company shall advise the Union when production or shipping requirements make it necessary for the Company to increase or decrease the working schedule of any department.

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7. Casual overtime shall be arranged for between a member of supervision and the Employee or Employees necessary. Such overtime shall be divided as equally as proficient operations permit among the Employees who are performing similar work in the group.

8. No Employee shall work before or after his regular working schedule unless such work has been first authorized by the Company, in which event the Employee shall be compensated for such work.

## **ARTICLE V**

### **HEALTH AND SAFETY**

1. In order to minimize accidents and health hazards the Company will continue to provide safety devices, guards, systematic safety inspections, and medical service.

## **ARTICLE VI**

### **VACATIONS**

#### **1. Service Requirements**

a. Hourly-rated Employees will be granted one (1) week of vacation with pay after completion of one (1) year of accumulated service credits; two (2) weeks after completion of five (5) years of accumulated service credits, and three (3) weeks after completion of fifteen (15) years of accumulated service credits.

b. Hourly-rated employees who have more than one (1) year of accumulated service credits but less

than five (5) years of accumulated service credits will receive additional days of vacation as follows:

over two years but less than three years—1 day

over three years but less than four years—2 days

over four years but less than five years—3 days

#### 2. Holiday in Vacation Period

When the vacation period includes one of the seven paid holidays listed in Section 2 of Article X an additional day of vacation will be granted with pay if the holiday occurs during the normally scheduled workweek of the Employee. The extra day will, at the discretion of the Plant Manager, be scheduled immediately before or after the vacation period. Observed holidays occurring during an Employee's vacation period will be considered as part of his vacation time.

#### 3. Leave of Absence

When an Employee who is qualified for a vacation allowance is granted a leave of absence, the vacation pay allowance for which he is qualified may be paid, if the Plant Manager approves.

#### 4. Basis of Payment

a. Vacations for all qualified Employees will be paid at straight-time rates on the basis of the standard working schedule of five days, forty hours per week, except as noted in Paragraphs b. and c. below.

b. Employees, such as cleaners or others on special short shifts, will receive vacation allowances based on actual scheduled hours per week.

c. Vacation payments to Employees working extended schedules will be as follows:

(1) Employees working an average of more than forty hours during the eight weeks immediately preceding the last week worked prior to commencement of vacation will be paid on the following basis:

(i) If the average number of hours worked per week during this eight-week period was more than 40 hours but less than 42 hours, payment will be made on the basis of 40 hours.

(ii) If the average number of hours worked per week during this eight-week period was 42 or more but less than 48, payment will be made for the nearest number of such average hours (i.e. if the average is 43.6 hours, payment will be made for 44 hours). If an Employee is entitled to any additional days of vacation, payment for the additional days will be made at the rate of not more than eight hours per day.

(iii) If the average number of hours worked per week during this eight-week period was 48 hours or more, payment will be made for 8 hours.

(iv) To qualify for more than 40 hours' pay, an Employee must have worked an average of 42 or more hours. In other words, absences during the eight-week period will reduce the vacation payment, but not, of course, below the floor of 40 hours.

(v) Time lost from work because of absences will not be deducted if the cause of such absence was spent on Union activities; an observed holiday; jury duty service; or attendance, pursuant to orders, at an armed services encampment or other armed service continuance training program, provided that no more than two weeks in a single calendar year shall be so credited as time worked.

(2) All payments will be based upon straight-time hourly earnings, i.e., no overtime premium will be added for hours in excess of 40.

(3) Since the requirement that an average of at least 42 hours must be worked before extended schedules are recognized is intended to screen out occasional and casual overtime, the amount of vacation payment will be computed for each individual Employee without regard to the amount or extent of overtime worked by other Employees in the division or unit in which he is employed.

d. An Employee who takes his vacation prior to the date upon which he becomes eligible, will receive payment upon qualifying on the basis of (a) his rate of pay at the time his vacation is taken and (b) his work schedule for the eight-week period ended one week prior to the commencement of vacation.

e. Employees who are on shift operation and working from  $37\frac{1}{2}$  to 40 hours per week will receive a vacation allowance based on a 40-hour week.

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f. The amount of vacation allowance will be determined by multiplying the average hourly earnings (exclusive of overtime premium) by the regular weekly scheduled hours. The average earnings will be obtained from the last available regular monthly statistics except that, in the case of day workers only, when an Employee's job and rate has been changed prior to or coincident with the vacation period, the new rate of earnings will be used.

g. For determining vacation allowances, night shift differential for Employees whose regular schedules are on those shifts will be included in average hourly earnings.

h. Vacation pay allowances may be drawn in advance on the pay day preceding the Employee's vacation.

## 5. General Regulations

a. The annual plant shutdown for vacation purposes shall be considered as the vacation period which will run concurrently with the shutdown. The third week of vacation for Employees entitled to it will be scheduled immediately before or after the shutdown period. Employees whose term of one to five years of continuous service is completed after the shutdown period may be granted additional vacation pay allowances for which they are qualified after the shutdown period but before the end of the year. If they were absent during the shutdown, they may not be required to take additional time off. Other exceptions for certain departments or individuals by reason of the requirements of the business shall be at the Plant Manager's discretion.

b. The vacation season shall begin on January 1 and end on December 31 of each year. Vacations outside of shutdown will, at the Plant Manager's discretion, be scheduled to conform to the requirements of the business. No vacation shall be divided unless it is of two weeks' or more duration, in which case a division may be made only with the consent of the Plant Manager.

c. (1) An additional day or days of vacation for which an Employee is qualified will be scheduled at the discretion of the Plant Manager.

(2) Additional day or days for which an Employee may qualify, later in the year may be taken at the time of the regular vacation and payment for such time will be made when the Employee has qualified.

d. (1) An Employee who is removed from the payroll for reasons other than lack of work, illness or injury and who is re-engaged within any calendar year without a break in service, must thereafter work in such a year a period of six months (or a period equal to his absence if less than six months) before receiving the vacation for which he would have otherwise been eligible for that year.

(2) If the Employee's absence was due to illness or injury, the following procedure will apply:—

(i) Such Employees who return to work prior to the vacation shutdown, will be paid the vacation allowance for which

qualified at the time of the shutdown. Where no shutdown is scheduled or where such Employees return after the vacation shutdown, they shall work for one (1) month and then be eligible for their vacation allowance unless scheduled for vacation later in which case they shall be paid at the time of their vacation.

(ii) Any such Employee re-employed too late to work a period of one (1) month in the calendar year will be paid his vacation allowance and may have a portion of the time out considered as the vacation to which he is otherwise eligible.

(iii) Employees who fail to receive vacation pay for which qualified in any calendar year because of absence due to illness or injury and who return to work with continuity of service at any time in the following calendar year will be paid a pro rata vacation allowance for the prior year. Such pro rata payment shall be, for each month or major part thereof worked in the prior calendar year, one twelfth of the vacation allowance the Employee would have been paid in such prior year.

(3) Any such Employee who will qualify for a vacation late in the year may, if the Plant Manager approves, take his vacation at an earlier date, as if eligible, and then receive full payment when he qualifies.

e. It will not be permissible to postpone vacations from one year to another, or to omit vacations and draw vacation pay allowances in lieu thereof.

## 6. Pro Rata Payments

a. Employees who quit, resign, die, are discharged or laid off for lack of work prior to receiving their vacation pay for the calendar year will be paid one-twelfth of the vacation allowance for which they have qualified for each month or major part thereof from January 1 of the calendar year to the date removed from payroll; except that Employees who complete their first year of accumulated service credits after January 1 and who are laid off before taking a vacation, will receive the full vacation pay for which they are qualified as of the time of layoff. In the case of Employees who die, pro rata vacation payment will be treated as wages owing the Employee, and payment made accordingly.

- b. (1) Those Employees who are laid off for lack of work, if re-employed by the Company during the same calendar year, will at the time of re-employment or at the time of the vacation shutdown (whichever is later) become eligible for a payment which, when added to the pro rata payment made at the time of layoff, will equal the total vacation allowance for which they are then qualified.
- (2) Those Employees who are laid off for lack of work and not re-employed during the same calendar year, but who are re-employed within 12 months of the date of removal from payroll, will at the time of re-employment or at the time of the vacation shutdown (whichever is later) become eligible for payment of full vacation for which they are then qualified.

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## **ARTICLE VII**

### **LAYOFFS — HIRING**

1. When it becomes necessary to increase or decrease the operating force, the Company will give first consideration to the number of accumulative service credits of each Employee and secondly, ability, skill, experience and quality and quantity performance.
2. The Company shall give Employees at least one week's notice in writing before a layoff (other than a temporary layoff) except in cases when a layoff could not be foreseen.

## **ARTICLE VIII**

### **REHIRING**

1. No individual shall be hired until former Employees whose service has not been broken in accordance with Article III, paragraph 6, above, qualified to do the work available, have been considered for the work and given an opportunity by written notification to return to work, when there is time for giving a written notice. Otherwise, a verbal notice shall be given.

## **ARTICLE IX**

### **WAGE RATES, OVERTIME, PREMIUM AND OTHER PAYMENTS**

1. The Company shall furnish the Union, within 30 days after the signing of this Agreement, a complete list of job classifications and rate ranges.
2. The starting rate shall be not less than \$1.037 plus "adders."

3. The minimum daywork rate shall not be less than \$1,120 plus "adders." Such minimum daywork rate shall be paid an Employee who is on daywork, as soon as the Employee has proved to be satisfactory but not later than after 8 weeks of service credits have been accumulated.

3a. If an Employee has proven to be unsatisfactory within this period, the Employee shall be transferred or discharged as being unsatisfactory.

4. Should the bonus operators fail to earn an average of the guaranteed rate per hour per week then the earnings will be adjusted for the difference between the amount actually earned and the guaranteed rate for the job.

5. All Employees on recognized second and third shifts shall be paid an additional 10% bonus over the rate paid for such work done in the daytime.

6. Rate ranges for group leaders shall be at least 6 cents above the corresponding rate range for the highest job classification in the group which they are leading.

7. The guaranteed rate for the job shall be paid bonus operators, irrespective of hours involved for idle time, except as provided in paragraph 14 below; first aid, except as provided in paragraph 8 below; receiving instructions; scrap minutes charged to the same operator or operators responsible for the loss.

8. For time spent in the Company dispensary as the result of an industrial injury day workers shall be paid their daytime rate. Bonus workers shall be paid the 30% bonus, and learners shall be paid average earnings or 30% bonus whichever is less.

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9. A bonus worker, who is temporarily transferred for the purpose of instructing other bonus workers shall be paid at the rate of his or her average straight-time hourly earnings for the preceding full week.
10. A bonus worker temporarily transferred for the convenience of the Company (such as assisting in the development of new methods or equipment) shall be paid at the rate of his or her average straight-time hourly earnings for the preceding full week.
11. An Employee temporarily transferred from a bonus job which continues, for the purpose of doing a special job at which the Employee is particularly skilled, shall be paid at the rate of his average straight-time earnings for the preceding full week.
12. When starting a new conveyor, if certain selected Employees, chosen because of special skills are transferred to the new group from jobs which are continuing, they will be paid their average straight-time earnings for the preceding full week until the group starts on a training program.
13. Work performed by conveyor groups during "pilot runs" shall be paid for at the average straight-time earnings for the preceding full week.
14. Conveyor down time caused through parts shortages, defective parts, machine breakdown or change overs, shall be paid at guaranteed rate. If the accumulated down time exceeds two hours per week, the excess will be paid for at the current week's average straight-time earnings.
15. All allowances for work other than that listed above will be paid at the operator's daywork rate applicable to the job performed.

- 16. Overtime allowances at time and one-half the Employee's average straight-time hourly rate for the current pay week shall be paid Employees for hours worked in excess of eight hours in any single working day or in excess of forty hours in any regular working week. Similar overtime allowances shall be paid to all Employees who work between 7:00 a.m. Saturday and 7:00 a.m. Sunday and on Washington's Birthday, Columbus Day, and Armistice Day, except to those Employees whose regular working schedule requires them to work on such days or during such hours.
- 17. Double time at the Employee's average straight-time hourly rate for the current pay week shall be paid to Employees for work performed between 7:00 a.m. Sunday and 7:00 a.m. Monday, and for hours worked in excess of 16 hours in any 24-hour period beginning with the start of the Employee's shift, and for work performed on New Year's Day, Patriot's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, except to those Employees whose regular working schedule requires them to work on such days or during such hours.
  - a. Employees whose regular working schedule falls upon New Year's Day, Patriot's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, shall be paid double time at their average straight-time hourly rate, provided said Employees have at the time of such work accumulated at least eight weeks' service credits and have worked a full schedule of hours on their regularly scheduled work day immediately preceding and immediately following such holidays, except for absences specified in

Article X, paragraph 2 c. If full schedules of hours have not been so worked, such Employees shall be paid at their average straight-time rate only for the actual hours worked on said holidays.

18. If the Company fails to notify an Employee not to report for work, and as a result the Employee does report, he shall receive not less than four (4) consecutive hours of work and pay therefor, or not less than four (4) hours pay at the discretion of the Company, providing the Employee accepts such work as may be assigned to him. The four (4) hours pay referred to above shall be at daywork rate for dayworkers, shall be at 30% bonus for bonus workers, and in the case of learners shall be at their average earnings or 30% bonus whichever is less. The provisions of this Section, however, shall not apply in the event the cessation of the Company's operations has been caused by circumstances beyond its control.

19. An Employee who is called in outside of his regular working schedule shall be paid at his average straight-time hourly rate or at the appropriate overtime rate, as the case may be; provided, however, that in no event shall said Employee be paid less than the equivalent of four (4) hours' pay at his average straight-time hourly rate for the current pay week. Bonus workers shall be paid at least the 30% bonus, and learners shall be paid at their average earnings or 30% bonus whichever is less.

20. Day shift Employees who are told to report after midnight shall be paid double time up to the start of their regular shift, and second and third shift Employees who are called in prior to the start of their regular shift shall be paid at the rate of time and one-half up to the start of their regular shift.

21. There shall be no pyramiding of overtime on overtime, overtime on premium time, or vice-versa.

## ARTICLE X

### HOLIDAYS AND PAY FOR HOLIDAYS NOT WORKED

1. The Company agrees to recognize the following holidays: New Year's Day, Washington's Birthday, Patriot's Day, Memorial Day, Fourth of July, Labor Day, Columbus Day, Armistice Day, Thanksgiving Day and Christmas. If a ~~holiday~~ falls on Sunday, it shall be recognized on the following Monday.

2. Employees, except those specified in paragraph 3 hereof, who have accumulated at least eight weeks' service credits shall be paid at their average straight-time rate for the following holidays not worked: New Year's Day, Patriot's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day provided—

a. Such holiday is observed during the individual Employee's regularly scheduled workweek; and

b. Provided such holiday is not observed during a plant or departmental shutdown other than for vacation purposes; and

c. Provided said Employees have worked the full schedule of hours on their regularly scheduled workday immediately preceding and immediately following such holiday; however, payment for the holiday will be made if the Employee worked during the week in which the holiday occurs, but is absent on the above

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days due to Union activity, verified illness, emergency illness at home, death in family, jury duty, having been sent home during the week in which the holiday occurs for lack of work, having been out for lack of work for not more than two calendar weeks preceding the week in which the holiday occurs; and

d. Provided such Employees, when requested to work on such holidays, due to emergencies, comply with such request, unless they have a legitimate reason for not working.

(1) In the event an Employee does work upon such a holiday pursuant to the Company's request, said Employee shall be paid double time at his average straight-time rate for the hours actually worked and straight time at such rate for the remaining unworked portion of the eight-hour holiday period.

3. Employees, regularly scheduled to work on any of the seven holidays specified in paragraph 2 above, who are notified by the Company not to work on such days, shall nevertheless be paid therefor, at their average straight-time rate, provided—

a. Said Employees have accumulated at least eight weeks' service credits; and

b. Said Employees have worked their full schedule of hours on their regularly scheduled workday immediately preceding and immediately following such holiday, except for absences specified in paragraph 2 c of this Article.

**ARTICLE XI****DISCRIMINATION**

1. It is the policy of both the Company and the Union not to discriminate against any Employee because of race, color, creed, marital status or national origin.

**ARTICLE XII****GRIEVANCE PROCEDURE**

1. The following shall be the procedure for the adjustment of grievances:

Step 1. After the occurrence or knowledge of the situation, condition or action of Management giving rise to the grievance (a grievance concerning dismissal for cause other than layoff for lack of work must be filed in writing within one calendar week from the time that the Employee was discharged or the same shall be deemed to have been waived by the Employee and Union), Employees may take up grievances with their foremen either directly or through their steward.

If the grievance is taken up directly by the Employee with the foreman and the answer is not satisfactory, the Employee may take up the grievance with his steward, at which time the grievance shall be reduced to writing, signed by the Employee, and given to the foreman. If the first contact is through the steward, the procedure outlined in this paragraph shall be followed.

In general, the foreman will give a reply within 24 hours but if more time is required he will advise the Employee or steward, as the case may be, and an

answer shall be given within a calendar week of the presentation. The reply shall be in writing, if given to the foreman in writing.

Step 2. When agreement is not reached in Step 1, the grievance may be referred to the Business Agent, who together with the Employee involved, and his steward may take it up with the Plant Personnel Supervisor and the foreman. The Company representatives will give a decision in writing within a calendar week, unless an extension of time is mutually agreed upon.

Step 3. When agreement is not reached in Step 2 the grievance may be referred to the Plant Manager and the Plant Personnel Supervisor by the Business Agent. The answer of the Company shall be given in writing within one calendar week, unless an extension of time is mutually agreed upon.

Step 4. When agreement is not reached in Step 3, the grievance may be referred to the Union Executive Board who may take it up with Management. Management's answer shall be given in writing within one calendar week of presentation, unless an extension of time is mutually agreed upon.

2. Any answer of Management not appealed by the Union from one step of the grievance procedure to the next step within two calendar weeks shall be considered as settled on the basis of the last answer given.

### **ARTICLE XIII ARBITRATION**

1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishment of

wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company. The party desiring to arbitrate shall give the other written notice of its intention to arbitrate within thirty (30) days after the decision in Step 4 of Article XII is rendered unless this time limit has been extended in writing signed by both parties.

2. If the Company and the Union are unable to agree on the selection of an arbitrator within fifteen (15) days the Federal Mediation and Conciliation Service shall be asked to submit a list or lists of arbitrators from which one will be agreed upon.

3. The arbitrator shall hear and determine the dispute or controversy as promptly as possible and shall issue findings or award a decision in writing. The decision of the arbitrator shall be final, binding and conclusive upon the parties. Such decision shall be within the scope and terms of this Agreement and the authority of the arbitrator shall be limited to the interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement.

4. The cost of any arbitration shall be borne equally between the Company and the Union except each party shall pay the expenses of all witnesses called by it.

5. It is specifically agreed that no provision of this Agreement or other Agreements between the parties shall be subject to arbitration pertaining in any way to the establishment, administration, interpretation, or application of Insurance or Pension Plans in which the Employees are eligible to participate.

**ARTICLE XIV****STRIKES AND LOCK-OUTS**

1. There shall be no strike, sit down, slow down, Employee demonstration or any other organized or concerted interference with work of any kind in connection with any matter subject to the grievance procedure and no such interference with work shall be directly or indirectly authorized or sanctioned by the Union or its officers or stewards. This provision shall not be applicable with respect to a strike called by the Union to be participated in by all Employees in the bargaining unit provided that:

a. Such strike is called with respect only to grievances which have been processed in accordance with all the respective and successive steps of the grievance procedure set forth in Article XII and arbitration has not been resorted to in accordance with Article XIII; and

b. Such strike is called and commences within sixty (60) days following the decision of the Company given to the Union pursuant to Article XII, Step 4.

2. Employees who violate the provisions of this Section are subject to disciplinary action.

3. The Company will not lock out any Employees.

## ARTICLE XV OFFICERS AND DELEGATES

1. Any Employee entering the employ of the Union or its parent bodies or named as a delegate or officer of the Union shall be granted a leave of absence by the Company without pay and without loss of accumulated service credits for a period of not more than one year.

## ARTICLE XVI NOTICE OF AGREEMENT AND BULLETIN BOARDS

1. The Union will provide the Company with exact copies of this Agreement which the Company will make available to new Employees.
2. The Company will permit the Union use of Union bulletin boards to post regular Union notices authorized by officers of the Union and approved by the Company. However, such approval shall not be construed as agreement to the subject matter contained in such notice.

## ARTICLE XVII RETIREMENT

1. An Employee may retire at his or her option as provided in the Company Pension Plan, or be retired by the Company upon reaching the age for normal retirement and as provided in the Company Pension Plan whether or not such Employee is participating in the Plan.

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## **ARTICLE XVIII**

### **MODIFICATIONS**

1. If either the Company or the Union desires to modify this Agreement it shall, not more than sixty (60) days and not less than thirty (30) days prior to June 10, 1954, and any anniversary date of said Agreement thereafter, present to the other written notice of the proposed modifications.
2. Not later than fifteen (15) days following receipt of such notice, collective bargaining negotiations shall commence between the parties for the purpose of considering the modifications so proposed in said written notice. Failing agreement upon such proposed modifications, the Union shall have the right to strike, but this Agreement shall continue in effect for an additional year unchanged as provided in Article XIX hereof.
3. In the event of such strike, the Company may, at its option, terminate this Agreement upon three (3) days' written notice to the Union.

## **ARTICLE XIX**

### **TERMINATION**

1. This Agreement shall be effective as of June 10, 1953, provided, however, that there shall be no retroactive payment made of any kind covering the period between the effective date of June 10, 1953, and the date of actual execution of this Agreement, and shall continue in full force thereafter until June 10, 1954, and thereafter from year to year unless not later than sixty (60) days prior to June 10, 1954, or any subse-

quent anniversary date either party shall notify the other in writing of its intention to terminate the Agreement upon such anniversary date.

Ashland, Massachusetts

Local 205, United  
Electrical, Radio and  
Machine Workers of  
America (UE)

Armando Mazzaro  
Hans Hakansson  
Grant T. Reeves  
George Willis  
George Blamire  
Anthony J. Sarno  
Fred J. Besozzi  
Charles R. Carr  
David A. Clements  
W. F. Murdock

Telechron Department  
General Electric  
Company

B. J. Nolan  
P. C. Baker  
R. B. Hally  
D. E. Whitelam  
A. E. Fisher

[fol. 9]

**EXHIBIT B TO COMPLAINT**

[The contract of June 29, 1953 (Exhibit A) was modified on July 14, 1953 and extended until September 1955. The pertinent provisions of the contract of June 1953 remain unchanged. The provisions in the modified and extended contract concerning its extension and termination are as follows:]

*Agreement.*

This Agreement made the twenty-ninth of June, 1953, and modified July 14, 1954, between Telechron Department of the General Electric Company (referred to as Company) and Local 205 U.E.R.M.W.A. (referred to as Union).

*Article XX**Termination*

1. This Agreement shall be effective as of July 7, 1954 and shall continue in full force thereafter until September 17, 1955 and thereafter from year to year unless not later than sixty (60) days prior to September 17, 1955 or any subsequent anniversary date, either party shall notify the other in writing of its intention to terminate the Agreement upon such anniversary date.

[fol. 10] **IN UNITED STATES DISTRICT COURT****MOTIONS TO STRIKE, TO DISMISS OR FOR MORE DEFINITE STATEMENT—Filed January 17, 1955**

The defendant moves the Court as follows:

**MOTION TO STRIKE MATTER RELATING TO DAMAGE**

1. To strike paragraph 5 under Count II of the complaint and that part of the prayer for relief which demands damages on the ground that such matter is redundant, im-

material and impertinent in that it relates only to the question of special damages but the items thereof are not specifically stated.

#### Motion to Strike Request for Specific Performance

2. To strike that part of the prayer for relief which demands that defendant be compelled to arbitrate the so-called Boiardi and Armstrong grievances in that neither Count I nor Count II of the complaint states a claim against defendant upon which this Court has jurisdiction to grant the remedy of specific performance;

#### Motion to Dismiss

3. To dismiss the action on the ground that neither Count I nor Count II of the complaint states a claim against defendant upon which any relief can be granted.

#### Motion for More Definite Statement

4. If the motion to dismiss set forth in paragraph 3 above is denied, to order the plaintiff to furnish a more definite statement of the following matters:

##### Count I.

4.1 The specific issue or issues (including the plaintiff's allegations of relevant facts) which are involved in the so-called Boiardi grievance and which according to the plaintiff are subject to arbitration under the agreement attached to the complaint and marked [fol. 11] Exhibit B and which the defendant should be compelled to arbitrate.

4.2 The specific provisions of said agreement, the application or interpretation of which according to the plaintiff are involved in the resolution of the aforesaid issue or issues relating to the Boiardi grievance so as to present an arbitrable issue under Article XIII, Sections 1 and 3, of said agreement.

##### Count II

4.3 The specific issue or issues (including the plaintiff's allegations of relevant facts) which are involved

in the so-called Armstrong grievance and which according to the plaintiff are subject to arbitration under the agreement attached to the complaint and marked Exhibit B and which defendant should be compelled to arbitrate.

4.4 The specific provisions of said agreement, the application or interpretation of which according to the plaintiff are involved in the resolution of the aforesaid issue or issues relating to the Armstrong grievance so as to present an arbitrable issue under Article XIII, Sections 1 and 3, of said agreement.

4.5 If the defendant's motion to strike paragraph 5 under Count II is denied, the particular items of special damage (including the amount or amounts thereof) claimed in said paragraph 5 with respect to both Count I and Count II of the complaint.

The ground of this motion is that plaintiff's complaint is so vague and ambiguous that defendant cannot reasonably be required to frame a responsive pleading on either Count I or Count II, in that (i) the complaint alleges the filing of certain grievances but fails to set forth the specific issues involved in said grievances which are arbitrable under the agreement and fails to set forth and identify any [fol. 12] specific provisions of the agreement, the application or interpretation of which are involved in the resolution of such issues, and (ii) paragraph 5 under Count II of the complaint apparently alleges items of special damage but the same are not stated with sufficient particularity.

(S.) Francis J. Vaas, Attorney for Defendant.  
Ropes, Gray, Best, Coolidge & Rugg, 50 Federal  
Street, Boston 10, Massachusetts.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—February 24, 1955

ALDRICH, D. J.:

In spite of certain semi-concessions, including my own, made at the argument it seems to me on further examination of the complaint that before I am called upon to depart

from a previous decision of this court there should be allegations definitely showing that the point is raised. The plaintiff alleges that it filed grievances, but it does not, in my opinion, allege substantive facts affirmatively showing that it in fact had bona fide grievances, cf. *North Station Wine Co. v. United Liquors, Ltd.*, 323 Mass. 48, 51, or that they were grievances which, whether the plaintiff was right or not, reasonably appeared within the arbitration clause.

The plaintiff may have until March 4 to file an amendment or a new complaint.

(S.) Aldrich, U. S. D. J.

[fol. 13] IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT FOR SPECIFIC PERFORMANCE OF  
CONTRACT TO ARBITRATE AND FOR DAMAGES—Filed  
March 11, 1955

Count I

1. Plaintiff is a voluntary unincorporated labor association which has been certified by the National Labor Relations Board, and is recognized by the Company, as the exclusive representative for the purpose of collective bargaining of the hourly rated production and maintenance employees of defendant Company, employed in its Telechron Department plant at Ashland, Massachusetts in an industry affecting commerce. Plaintiff maintains its principal office in Ashland, Massachusetts, where its duly authorized officers and agents are engaged in representing and acting for employee members.

2. Defendant is a corporation organized under and by virtue of the laws of the State of New York and doing business at its Telechron Department plant in Ashland, Massachusetts. It is the employer of the employees who are members of plaintiff Union, and is engaged in, and its activities affect, interstate commerce.

3. This action arises under the provisions of Section 301(a), 301(b) and 301(c) of the Labor Management Relations Act of 1947 (29 U.S.C.A. Sections 151, 185(a), 185(b) and 185(c)).

4. On June 29, 1953, plaintiff and defendant entered into a collective bargaining contract, effective as of June 10, 1953, which continued in effect until June 14, 1954, when it was modified, and, as modified, is in effect until September 27, 1955. Copies of these contracts are attached to the Complaint herein, filed December 16, 1954, and made a part hereof as Exhibits A and B and are referred to hereinafter as the contract. The contract provides in Article XIII thereof:

[fol. 14]      *"Arbitration"*

1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishment of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company. The party desiring to arbitrate shall give the other written notice of its intention to arbitrate within thirty (30) days after the decision in Step 4 of Article XII is rendered unless this time limit has been extended in writing signed by both parties.

2. If the Company and the Union are unable to agree on the selection of an arbitrator within fifteen (15) days the Federal Mediation and Conciliation Service shall be asked to submit a list or lists of arbitrators from which one will be agreed upon.

3. The arbitrator shall hear and determine the dispute or controversy as promptly as possible and shall issue findings or award a decision in writing. The decision of the arbitrator shall be final, binding and conclusive upon the parties. Such decision shall be within the scope and terms of this Agreement and the authority of the arbitrator shall be limited to the interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement.

4. The cost of any arbitration shall be borne equally between the Company and the Union except each party shall pay the expenses of all witnesses called by it.

5. It is specifically agreed that no provision of this Agreement or other Agreements between the parties

shall be subject to arbitration pertaining in any way to the establishment, administration, interpretation, or [fol. 15] application of Insurance or Pension Plans in which the Employees are eligible to participate."

5: The contract further provides in Article IX thereof:

"1. The Company shall furnish the Union, within thirty (30) days after the signing of this Agreement a complete list of job classifications and rate ranges."

6. Pursuant to the foregoing provision of Article IX of the contract, defendant furnished plaintiff a complete list of job classifications and rate ranges within thirty (30) days after the signing of the contract in June, 1953. This list included the job classification "Repairman I Class, 3501" for which the rate range was stated as beginning with \$1.546 an hour, as the lowest rate in such classification.

7. From and after June 10, 1952, Joseph Boiardi, a member of plaintiff Union, was employed by defendant, with a job classification of Repairman I Class, 3501, but was at all times paid at the rate of \$1.489 an hour. No such rate appears in the rate ranges applicable to Repairman I Class, 3501, in the list furnished to plaintiff by defendant, pursuant to Article IX of the contract.

8. On April 2, 1954, plaintiff filed a written grievance with defendant that the said Joseph Boiardi was being paid and for a considerable period of time thereto had been paid at a lower rate of pay than specified in his job classification furnished under Article IX, paragraph 1, of the contract, that defendant had not properly applied the contract in its payments to Boiardi, and that Boiardi should be paid the rate which his classification calls for. Thereafter, plaintiff duly processed the said grievance in accordance with the grievance-procedure of the said contract without reaching agreement with defendant.

9. On June 10, 1954, plaintiff duly notified defendant in writing that, in accordance with Article XIII of the contract, it requested submission to arbitration of the Joseph Boiardi grievance; that it considered the Company's action [fol. 16] to be in violation of the contract; and that it nominated a certain arbitrator.

10. On June 16, defendant notified plaintiff that it was

unwilling to arbitrate this matter. Thereafter, despite other requests by plaintiffs to submit the matter to arbitration, defendant continued to refuse and still refuses to submit either the arbitrability of the grievance or the grievance itself to arbitration, in violation of the said contract, and to carry out its agreement to arbitrate as set forth in Article XIII of said contract.

### Count II

1. Paragraphs 1 through 4 of the First Count are re-alleged and made a part hereof.
2. Article XII of the contract provides:

#### "Grievance Procedure

1. The following shall be the procedure for the adjustment of grievances:

Step 1. After the occurrence (sic) or knowledge of the situation, condition or action of Management giving rise to the grievance, (*a grievance concerning dismissal for cause* other than layoff for lack of work must be filed in writing within one calendar week from the time that the Employee was discharged or the same shall be deemed to have been waived by the Employee and Union), Employees may take up grievances with their foremen either directly or through their steward.

....." (Italics supplied)

3. On and before August 13, 1954, Charles Armstrong, a member of the plaintiff union was employed by defendant as an hourly-paid tool crib attendant. On or about August 13, 1954, he was asked by his foreman to clean certain machines, in addition to his duties as a tool crib attendant. [fol. 17] Upon his refusal to undertake the additional work as requested, he was discharged, allegedly for cause.

4. On August 13, 1954, plaintiff filed a written grievance with defendant that employee Armstrong had been discharged arbitrarily, and not for cause, due to a misunderstanding as to the duties of his job, on the basis of defendant's job description of Armstrong's duties as a tool crib attendant, which failed to describe the duties of a tool crib attendant thoroughly; and the foreman's failure to instruct

Armstrong at any time as to the duties of a tool crib attendant. The grievance alleged that the penalty of discharge was too severe. Plaintiff duly processed the said grievance through the grievances procedure under the said contract without reaching agreement with defendant.

5. On September 24, 1954, plaintiff duly notified the defendant that it was submitting to arbitration the Charles Armstrong grievance as a matter of application of the contract and would shortly submit the name of a proposed arbitrator and form of the question.

6. On September 30, 1954, defendant notified plaintiff that it refused to submit the said grievance to arbitration; and thereafter, despite renewed requests by plaintiff, defendant continued to refuse, and still refuses, in violation of said contract, to submit either the arbitrability of the grievance or the grievance itself to arbitration and to carry out its agreement to arbitrate as set forth in Article XIII of the said contract.

7. By reason of defendant's aforesaid refusal to arbitrate the said Boiardi and Armstrong grievances, and its aforesaid violations of the collective bargaining contract, plaintiff has been damaged in its collective bargaining relationship and its ability to act as collective bargaining representative for employees, it has lost prestige, good will, and organizational strength; and it has incurred expenses for payment of lost time and other expenses to union representatives [fol. 18] in negotiations with the defendant seeking to have the defendant agree to arbitrate the said grievances, in the sum of Five Hundred (\$500.00) Dollars, and the additional expenses of this law suit, including attorney's fees, to remedy the defendant's breach of its contract to arbitrate the said grievances, in the sum, to date, of Five Hundred (\$500.00) Dollars or such other sum as may be awarded by this Court.

Wherefore, plaintiff demands that defendant be required specifically to perform its agreement to arbitrate by submitting to arbitration the grievances involving Joseph Boiardi and Charles Armstrong, in accordance with Article XIII of the said contract, (2) damages in the sum of three thousand dollars (\$3,000), (3) if specific performance is not granted, plaintiff have judgment against defendant in

the sum of ten thousand dollars (\$10,000), (4) that defendant be required to pay the costs, disbursements, and expenses, including reasonable attorney's fees, in this action, (5) that plaintiff may have such other and further relief as the Court may deem just and proper.

By its attorney (s) Allan R. Rosenberg, 10 Tremont Street, Boston 8, Massachusetts.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE REQUEST FOR SPECIFIC PERFORMANCE—  
Filed March 28, 1955

The defendant moves the Court to strike that part of the prayer for relief which demands that defendant be compelled to arbitrate the so-called Boiardi and Armstrong grievances in that neither Count I nor Count II of the amended complaint states a claim against defendant upon [fol. 19] which this Court has jurisdiction to grant the remedy of specific performance.

(s) Francis J. Vaas, by LMcG (s) Lane McGovern,  
Attorneys for Defendant. Ropes, Gray, Best, Coolidge & Rugg.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed March 28, 1955.

First Defense to Count I

1. The defendant admits the averments of paragraph 1.
2. The defendant admits the averments of paragraph 2.
3. The defendant admits that the plaintiff purports to bring this action under the provisions of Section 301(a), 301(b) and 301(c) of the Labor Management Relations Act of 1947. The defendant denies every other averment of paragraph 3.
4. The defendant admits that, on June 29, 1953, plaintiff and defendant entered into a collective bargaining contract, effective as of June 10, 1953, but denies that said contract

was modified on June 14, 1954 or that said contract, as modified, is in effect until September 27, 1955. Further answering the averments of the first sentence of paragraph 4, the defendant says that said contract continued in effect until July 14, 1954, when it was modified, and, as modified, is in effect until September 17, 1955 and thereafter from year to year unless not later than sixty (60) days prior to September 17, 1955 or any subsequent anniversary date, either party shall notify the other in writing of its intention to terminate said contract upon such anniversary date. The defendant admits the averments contained in the last two sentences of paragraph 4.

5. The defendant admits the averments of paragraph 5. [fol. 20] 6. The defendant admits that, pursuant to Article IX of the contract, and within thirty (30) days after the signing of the contract in June, 1953, it furnished plaintiff a complete list, within the understanding of the parties, of job classifications and rate ranges. The defendant admits the averments of the second sentence of paragraph 6.

7. The defendant admits that Joseph Boardi was employed by defendant from and after June 10, 1952 but denies that his job classification, at any time, was Repairman I Class, 3501. Further answering, the defendant says that there is no reasonable basis for the plaintiff's allegation that, from and after June 10, 1952, Joseph Boardi's job classification was that of Repairman I Class, 3501. The defendant denies that Boardi was at all times paid at the rate of \$1.489 an hour from and after June 10, 1952, but says that Boardi was paid at said rate from and after June 16, 1952. The defendant admits the averments of the last sentence of paragraph 7.

8. The defendant admits that, on April 2, 1954, a written grievance was filed by plaintiff containing, in substance, the allegations as averred in the first sentence of paragraph 8. The defendant admits the averments of the second sentence of paragraph 8.

9. The defendant admits the averments of paragraph 9.

10. The defendant admits the averments of the first sentence of paragraph 10. As to the second sentence of paragraph 10, the defendant admits that plaintiff has made other requests to submit the matter to arbitration, and that defendant continued to refuse and still refuses to submit

either the arbitrability of the grievance or the grievance to arbitration, but denies that such refusal by defendant is in violation of said contract and denies that such refusal constitutes a refusal to carry out defendant's agreement to arbitrate as set forth in Article XIII of said contract.

{fol. 21} **Second Defense to Count I**

The defendant says that Count I fails to state a claim against defendant upon which relief, in the form of the remedy of specific performance, may be granted.

**First Defense to Count II**

1. For answer to paragraph 1 the defendant incorporates by reference the foregoing paragraphs number 1 through 4, inclusive, under defendant's first defense to Count I.

2. The defendant admits the averments of paragraph 2.

3. The defendant admits that on and before August 13, 1954, Charles Armstrong was a member of the plaintiff union and was employed by defendant as an hourly-paid tool crib attendant. The defendant admits that on or about August 13, 1954, Armstrong was asked by his foreman to clean certain machines, and that, upon his repeated refusal to do the work as requested, he was discharged. The defendant denies that said work was in addition to his duties as a tool crib attendant.

4. The defendant admits that, on August 13, 1954, a written grievance was filed by the plaintiff containing, in substance, the allegations as averred in the first two sentences of paragraph 4. The defendant admits the averments of the third sentence of paragraph 4.

5. The defendant admits the averments of paragraph 5.

6. The defendant admits that on September 30, 1954 defendant notified plaintiff that it refused to submit said grievance to arbitration. The defendant also admits that, thereafter, defendant continued to refuse, and still refuses, to submit either the arbitrability of said grievance or said grievance to arbitration, but denies that such refusal is in violation of said contract and denies that such refusal constitutes a refusal by defendant to carry out its agreement to arbitrate as set forth in Article XIII of said contract.

[fol. 22] 7. The defendant denies every averment set forth in paragraph 7.

### Second Defense to Count II

The defendant says that Count II fails to state a claim against defendant upon which relief, in the form of the remedy of specific performance, may be granted.

(s) Francis J. Vaas, by LMcG (s) Lane McGovern,  
Attorneys for Defendant, Ropes, Gray, Best, Cool-  
idge & Rugg.

IN UNITED STATES DISTRICT COURT

OPINION—March 28, 1955

ALDRICH, D.J.

This is a motion to strike claims for equitable relief in a suit brought under § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. The relief requested is specific enforcement of the arbitration provisions of a collective bargaining contract. Thus I am asked to review the decision of Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, D. Mass. 113 F. Supp. 137. This is a duty not lightly to be undertaken, but the arguments presented seem sufficiently persuasive to warrant such consideration. Certain implications of American Thread have not found uniform acceptance. Of greater importance, so far as I am concerned, the Court of Appeals has since had occasion to pass on one aspect of equitable jurisdiction under § 301(a), *W. L. Mead, Inc. v. International Brotherhood, etc.*, 1 Cir., 217 F. 2d 6, affirming my disclaimer of jurisdiction to enjoin a strike in violation of a collective bargaining contract, 125 F. Supp. 331.

In the Mead opinion I cited American Thread as authority for the belief that § 301(a) gives the court some equity powers if the Norris-LaGuardia Act does not interfere. As I read the decision of the Court of Appeals, the now material difference between that court and myself was that it was more cautious than I was with respect to that dictum. And while it did not criticize American Thread, neither could it be said that it gave it even oblique approval.

The substance of the decision of the Court of Appeals in Mead is summarized, at p. 9, in the following two sentences,

"Nowhere in the section [§ 301] is it expressly provided that the terms of the Norris-LaGuardia Act shall not be applicable to suits for violation of collective bargaining agreements; and § 301 contains no provisions necessarily inconsistent with the terms of the earlier Act. . . . It is an accepted canon of construction that repeals by implication are not favored."

The omitted portion of the opinion between those two sentences, and the Mead decision itself, indicates to me that the court felt American Thread could be considered sound only if the injunctive power there recognized was not contrary to the provisions of the Norris-LaGuardia Act, without the benefit of any implied repeal by the Labor Management Act.

The questions, therefore, are, does Norris-LaGuardia forbid injunctions to enforce arbitration agreements, and, if it does not, in the light of Norris-LaGuardia, does § 301, (a) by implication confer jurisdiction for such enforcement?

There can be no doubt that the refusal to arbitrate the interpretation and application of a wage rate, and of a discharge, although an alleged breach of a collective bargaining agreement, constitutes a labor dispute. *W. L. Mead v. International Brotherhood*, supra. With certain specific exceptions Norris-LaGuardia in terms forbids injunctions [fol. 24] in all labor disputes. Arbitration is not one of the stated exceptions. At the same time, however, it must be recognized that when Norris-LaGuardia was enacted compulsory arbitration was an unavailable remedy,<sup>1</sup> and logically could scarcely be expected to be included in the list

<sup>1</sup> Cf. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, assuming the Federal Arbitration Act did not apply, which no one then thought. *International Union v. Colonial Hardwood Floor Co.*, 4 Cir., 168 F.2d 33; *Mercury Oil Refining Co. v. Oil Workers Int. Union, CIO*, 10 Cr., 187 F.2d 980; but cf. *Hoover Motor Exp. Co. v. Teamsters, Chauffeurs, etc.*, 6 Cir., 217 F.2d 49.

of exceptions. It is also to be noted that the act did give affirmative approval of voluntary arbitration. 29 U.S.C. § 108.

American Thread cites several cases on the subject of Norris-LaGuardia. The first is *Milk & Ice Cream Drivers & Dairy Employees v. Gillespie Milk Products Corp.*, 6 Cir., 203 F.2d 650. This per curiam opinion is not persuasive. In the first place it seems to suggest that § 301 gives full injunctive powers. This is contrary to Mead. Beyond that, it relies on Aleo Mfg. Co., the second decision cited in American Thread, and discussed infra. American Thread's third citation is *Mountain States Division No. 17 v. Mountain States T. & T. Co.*, D.C.D.Colo., 31 F.Supp. 397, which holds that an action to enforce a collective bargaining agreement does not involve a "labor dispute." In the light of Mead, this is no authority.

The decision in *Textile Workers Union v. Aleo Mfg. Co.*, D.C.M.D.N.C., 94 F.Supp. 626, principally relied on by American Thread and Gillespie, is an interesting one. There a union sought a mandatory injunction to compel an employer to recognize an award and reinstate two striking employees. In taking jurisdiction the court made two observations. One was that the requirements of Norris-LaGuardia have been met. The other was that § 104 related only to injunctions against unions, and not to those sought in their favor.

[fol. 25] It is difficult to perceive on the face of the opinion how the requirements of the act had been met. Indeed, in this regard the decision is reminiscent of the type of judicial erosion suffered by the Clayton Act, against which loose interpretation § 101 of Norris-LaGuardia seems expressly designed. The court's second observation is also questionable. Regardless of what may be said about the general purpose clause, § 102, even though Norris-LaGuardia in fact proved to be, and doubtless, was expected to be, of far greater use to unions than to employers, I do not believe it was intended to be a one-way street. On the contrary, in the report of the Senate Judiciary Committee Senator Norris stated quite the opposite.<sup>2</sup>

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<sup>2</sup> "It will be observed that this section [106], as do most all of the other prohibitive sections of the bill, applies both

I am forced to conclude that the plain language of Norris-LaGuardia forbids the issuance of an injunction. Under the circumstances reliance on generalizations in the forms of declarations of policy which might lead me to think that Congress would have intended an exception for a situation which it does not appear that it anticipated, had it been visualized, seems to go beyond my powers. Furthermore, Congress had full opportunity to provide that exception itself when it passed the Labor Management Act; if by that act it had a purpose to create injunctive remedies. Having in mind that implied revocations are not favored, I discover nothing in the act, or in its legislative history,<sup>3</sup> to warrant [fol. 26] a finding that it did so. It becomes necessary to review the other aspects of American Thread. The motion to strike the prayer for an injunction is granted for want of jurisdiction. I do not pass on the defendant's remaining motions, since the plaintiff amended its complaint after they were heard. If it wants them considered, they should be remarked.

(S.) Aldrich, United States District Judge.

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to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees." Sen. Rep. No. 163, 72d Cong., 1st sess., 19.

<sup>3</sup>An earlier draft of the Labor Management Act expressly provided that Norris-LaGuardia should be repealed in the case of actions to enforce collective bargaining agreements. § 302(e). H.R. 3020. House Rep. No. 245, 80th Cong. 1st sess. 95. This section was rejected, except for express reservations, as Senator Taft thereafter informed the Senate. Congress, Rec. June 5, 1947, 6603. See, also, *Castle and Cooke Terminals v. Local 137, etc.*, D. Hawaii, 110 F.Supp. 247, 251.

## IN UNITED STATES DISTRICT COURT

MEMORANDUM—April 27, 1955

ALDRICH, D. J.

This action, brought in two counts, alleged that the defendant had refused to arbitrate a wage and a discharge matter with the plaintiff union as the representative under its collective bargaining contract of two of its employees. One count related to one employee, and one to the other. In each count the plaintiff asked for a mandatory injunction to compel arbitration, and for damages. The plaintiff did not ask for any restraining order or preliminary injunction, and before any injunction was asked for, apart from the general prayer for final injunction contained in the complaint, the defendant moved that this prayer for a final injunction be stricken.

In an opinion dated March 28, 1955 I stated I would grant the defendant's motion. The plaintiff is apprehensive that this is not the same thing as "refusing" an injunction, so as to permit an immediate appeal under § 1292. There would seem to be some basis for that apprehension. Cf. *American Machine & Metals, Inc., v. De Bothezat Impeller Co., Inc.*, 2 Cir., 173 F.2d 890; cert. den. 339 U.S. 979. *Bendix Aviation Corp. v. Glass*, 3 Cr., 195 F.2d 267, 272. The plaintiff states that it will file such an appeal, but also, in order to have another string to its bow, it now moves [fol. 27] under Rule 54(b) that the court "enter final judgment on the . . . allowance . . . of defendant's motion to strike request for specific performance."

Since March 28 Judge Sweeney has allowed a similar motion, and I am informed that Judge Clifford in Maine has denied a similar motion. The matter is of importance, and I have no hesitancy in determining, and do, that there is no just reason for a delay. I have more difficulty in determining that each count of the complaint, standing alone, contains more than one "claim for relief." If this means more than one cause of action, the requirements of Rule 54(b) are not met. If it means claims for more than one form of relief, viz., equitable and legal, they are met.

I further understand that although my opinion with relation to the defendant's motion was handed down March 28th, no actual order was entered thereon. I will therefore enter the order forthwith and I direct, so far as it be in my power to do so, that it be considered as a final judgment so far as the claims for equitable relief are concerned. I have no intention of revising my decision on those claims prior to any appeal.

Since the plaintiff is appealing, anyway, under § 1292, it is my purpose to add, so far as I can, to the jurisdiction of the Court of Appeals, although I have considerable doubts whether that purpose can be effected.

(s) B.A.

*U. S. D. J.*

IN UNITED STATES DISTRICT COURT

ORDER—April 27, 1955

ALDRICH, J. After hearing, and in accordance with the Opinion of the Court dated March 28, 1955, it is

Ordered that defendant's Motion to Strike the Plaintiff's Prayer for an Injunction is granted for want of jurisdiction, and a final judgment is entered dismissing claims for equitable relief.

By the Court (S.) John F. Davis, Deputy Clerk.

(s) BA, United States District Judge. 4/27/55.

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND AMENDED COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO ARBITRATE AND FOR DAMAGES—

Filed April 27, 1955

Plaintiff moves to amend the Amended Complaint herein, filed March 11, 1955, by striking therefrom Paragraph 7

of Count II and the following and substituting therefor the following:

7. The matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.
8. The plaintiff has no adequate remedy at law.
9. The plaintiff will be subject to substantial and irreparable injury unless granted the relief requested.
10. Wherefore, plaintiff demands that defendant be required specifically to perform its agreement to arbitrate by submitting to arbitration the grievances involving Joseph Boiardi and Charles Armstrong, in accordance with Article XIII of the said contract, and that plaintiff may have such other and further relief as the Court may deem just and proper.

By its attorney, (S.) Allan R. Rosenberg.

Assented to:

Ropes, Gray, Best, Coolidge & Rugg, by (S.) Francis Vaas, Attorney for the defendant.

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—April 27, 1955

ALDRICH, D. J.:

Plaintiff's motion to amend the amended complaint filed following my order of even date with relation to defendant's motion to strike is hereby allowed, and the action now being solely for equitable relief, for the reasons stated in the opinion of March 28th, the action is hereby dismissed for want of jurisdiction.

By the court, (S.) Penelope Odessy.

(S.) B. A., U. S. D. J.

## IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 27, 1955

Notice is hereby given that Local 205, United Electrical, Radio and Machine Workers of America (UE), plaintiff above-named, hereby appeals to the United States Court of Appeals for the First Circuit from the Order entered in this action on April 27, 1955, granting defendant's Motion to Strike Plaintiff's Prayer for Injunction for want of jurisdiction and entering final judgment dismissing claims for equitable relief, and from the Orders of Dismissal, entered by the Court on April 27, 1955.

(S.) Allan R. Rosenberg, Attorney for Appellant,  
Local 205, United Electrical, Radio and Machine  
Workers of America (UE), 10 Tremont Street,  
Boston 8, Massachusetts.

[fol. 30] Argument and submission—October 6, 1955.  
(omitted in printing).

[fol. 30a] IN UNITED STATES COURT OF APPEALS FOR THE  
FIRST CIRCUIT

MOTION TO AMEND COMPLAINT TO SHOW JURISDICTION—Filed  
January 31, 1956

Plaintiff Appellant moves to amend the Amended Complaint for Specific Performance of Contract to Arbitrate and for Damages herein by adding as the last sentence of paragraph one of Count I thereof: (R. 13)

“All of the employee members of, or employees represented by plaintiff Union are citizens of Massachusetts, Rhode Island or New Hampshire, none are citizens of New York”,

and as the last sentence of paragraph three of Count I thereof: (R. 13)

“This Court also has jurisdiction by virtue of Title 28, U. S. C. 1332(a)(1).”

By its attorney, (S.) Allan R. Rosenberg.

AFFIDAVIT IN SUPPORT OF APPELLANT'S MOTION TO AMEND  
COMPLAINT TO SHOW JURISDICTION

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Charles R. Carr, being duly sworn, deposes and says:

My name is Charles R. Carr. I live at 16 Curve Street, Millis, Massachusetts. I am employed at the plant of appellee, General Electric Company, Telechron Department, at Ashland, Massachusetts, and have been so employed for the past seventeen years, except for four years' service in [fol. 30b] the armed forces. I am and have been for the past two years Business Agent of Local 205, United Electrical, Radio and Machine Workers of America (UE), appellant herein. I make this affidavit in support of appellant's motion to amend complaint to show jurisdiction.

Based on my own personal knowledge and an examination of the records of appellant Union, I depose and say that all the employees who are members of or represented by appellant Union are and were at the time of commencement of suit herein, citizens of the Commonwealth of Massachusetts, the State of Rhode Island, or the State of New Hampshire, and none of them were at the time of commencement of suit herein or are now, citizens of the State of New York.

(S.) Charles R. Carr.

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, ss:

Subscribed and sworn to before me, this thirty-first day of January, 1956.

(S.) C. Bertram Crawford, Notary Public.

My commission expires April 2, 1959.

In UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT  
 ORDER OF COURT—April 25, 1956:

It is ordered that motion of appellant to amend complaint to show jurisdiction be, and the same hereby is, denied.

By the Court: (S.) Roger A. Stinchfield, Clerk.

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[fol. 30c] Clerk's Certificate to foregoing papers omitted in printing.

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[fol. 31] In UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4980

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), Plaintiff, Appellant,

v.  
 GENERAL ELECTRIC COMPANY, (TELECHRON DEPARTMENT,  
 ASHLAND, MASSACHUSETT., Defendant, Appellee

Appeal from the United States District Court for the District of Massachusetts

[129 F. Supp. 665.]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*

*Allan R. Rosenberg* for appellant.

*Warren F. Farr*, with whom *William J. Barron, Francis J. Vaas, Lane McGovern and Ropes, Gray, Best, Coolidge & Rugg* were on brief for appellee.

OPINION OF THE COURT—April 25, 1956

MAGRUDER, *Chief Judge*. This case, together with two others also decided today, presents the question of whether a federal district court has authority, under § 301 of the Labor Management Relations Act of 1947 (61 Stat. 156),

to compel an employer to arbitrate a dispute in accordance with the terms of a collective bargaining agreement between such employer and a labor organization representing employees in an industry affecting commerce."

[fol. 32] Plaintiff-appellant is an unincorporated labor organization representing employees of defendant Company at a plant in Ashland, Mass., which is, without dispute, in an industry affecting commerce, within the meaning of the Act. Article XII of the collective bargaining agreement in effect between the parties at the relevant dates established a conventional four-step procedure for adjustment of employee grievances between the Union and the Company, by which negotiation was to continue at progressively higher levels if an agreement was not reached. Article XIII provided:

"1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishing of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company. . . ."

The article required written notice of intention to submit an unresolved grievance to arbitration within 30 days after the decision rendered in step 4 of the grievance procedure, and it went on to describe certain procedural matters and restrictions on the scope of the arbitrator's authority. He was limited, in so far as relevant here, to "interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement."

Two grievances filed by the Union in 1954 are the subject of its present suit. One involved a dispute over whether an employee named Boiardi was employed in a certain job classification carrying a higher rate of pay than he in fact was receiving; the other involved the propriety of the discharge of an employee named Armstrong for refusing to clean certain machines when he asserted that such work [fol. 33] was in addition to his regular duties. After unsuccessfully prosecuting these matters through the procedure of Art. XII, the Union duly notified the Company in each

case of its desire to arbitrate, but the Company refused to submit to arbitration either the merits of the two grievances or the disputed issue of whether they were arbitrable under the provisions of Art. XIII first quoted above. The Union then filed its complaint in the district court, alleging jurisdiction under § 301. It sought as to each of the grievance cases an order "that defendant be required specifically to perform its agreement to arbitrate" and damages. After the district court granted a motion to strike the claims for equitable relief, the amended complaint was again amended to eliminate the damage claims. This was done so that no question could be raised as to the appealability of the decision. Plaintiff's appeal is properly here, under 28 U.S.C. § 1291, from the final order of April 27, 1955, which dismissed the complaint for want of jurisdiction, the district judge being of the view that he was forbidden by the Norris-LaGuardia Act (47 Stat. 70) from issuing the requested order to compel arbitration of the two disputes. See 129 F. Supp. 665.

## I

In any case where equitable relief in some form is sought in the context of a controversy involving labor relations, a federal court must inquire whether the Norris-LaGuardia Act has withdrawn the jurisdiction of the district court to grant the desired remedy. See *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, 217 F. 2d 6 (1954), in which case we affirmed an order denying a temporary injunction against a strike and picketing alleged to be in breach of a collective bargaining agreement. We held that § 301 had not repealed by implication the withdrawal of jurisdiction to enjoin the activities listed in § 4 of the Norris-LaGuardia Act even in a case where such activities constitute [fol. 34] a breach of contract. The present case presents a different problem, for the activity against which relief is sought, refusal to arbitrate, can in no way be fitted into any of the classes enumerated in § 4. However, consideration must also be given to § 7 of the Norris-LaGuardia Act, the relevant parts of which are set forth in the footnote.\* See

\* "Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any

also §§ 8 and 9. If it is not implicit in our discussion in the *Mead* case, *supra*, we now affirm that our determination there that enactment of § 301 did not by implication repeal § 4 of the Norris-LaGuardia Act applies as well to § 7 and indeed to the whole of that Act. It is in this light that one must read the dictum in the *Mead* opinion (217 F. 2d at 9) that "equitable relief may sometimes be given in terms which do not trench upon the interdictions of § 4 of the Norris-LaGuardia Act." That is, any such equitable relief to be given in a suit brought under § 301 must also not "trench upon the interdictions of" § 7, when that section [ffol. 35] and the Act of which it is a part are applicable according to their own terms.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought,

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case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each items of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complaint has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided; however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. . . ." (47 Stat. 71-72)

In recognition of this situation, it has sometimes been argued that a suit to remedy a breach of contract does not involve or grow out of a "labor dispute." This argument cannot be accepted, in the face of the sweeping definitions of § 13, which set the scope of the Norris-LaGuardia Act. (47 Stat. 73) Any controversy between an employer and a union "concerning terms or conditions of employment" is included, "and no less so because the dispute is one that may be resolved or determined on its merits by reference to the terms of a collective bargaining agreement." *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, supra 217 F. 2d at 8, and cases cited; see Note, 37 Va. L. Rev. 739, 746 (1951).

Nevertheless, it is our conclusion that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act. Although the present controversy is a "labor dispute" within the scope of the Act as defined in § 13, the relief sought is not the "temporary or permanent injunction" against whose issuance the formidable barriers

of § 7 are raised. Of course, the label used to describe the judicial command is not controlling. We would not rest by saying that an order to arbitrate is a "decree for specific performance" in contradistinction to a "mandatory injunction," for each term has been attached so frequently to this type of relief that neither can be rejected out of hand as an inappropriate characterization of it. But see 2 Pomeroy, Equitable Remedies § 2057 (2d ed. 1919). For reasons to be developed below, we believe that the "injunction" at which § 7 was aimed is the traditional "labor injunction," typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute. *E.g.*, *Alcoa Steamship Co., Inc., v. McMahon*, 81 F. Supp. 541 (S.D. N.Y. 1948), aff'd 173 F.2d 567 (C.A. 2d, 1949); *Associated Telephone Co., Ltd., v. Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953). An order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration, seems to have a different character, whatever name is given to it. Cf. *Sanford v. Boston Edison Co.*, 316 Mass. 631 (1944); *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (C.A. 5th, 1956) (arbitration order denied on other grounds).

It should be noted in passing that the Supreme Court has recently reaffirmed its ruling that an order denying a stay of an action for damages in favor of arbitration is "refusal of an 'injunction' under" 28 U.S.C. § 1292. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 180 (1955). Whether the same characterization would be applied to an order affirmatively compelling arbitration need not be decided, for the *Baltimore Contractors* case and its predeces-[fol. 37] sors were treating the stay order as an "injunction" only for the purpose of determining appealability under 28 U.S.C. § 1292(1), as is obvious from the opinions. What is an "injunction" for that statutory test would seem to have little relevance to what is an "injunction" in the wholly different context of the Norris-LaGuardia Act. Cf. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 452 (1935). See also *Goodall-Sanford, Inc. v. United Textile Workers*, No. 5029, decided today.

It is significant, while still at the verbal level, that within

the Norris-LaGuardia Act itself a distinction is made in the breadth of the bars imposed on equitable relief. The sections that might be relevant here all deny jurisdiction to issue an "injunction" (§§ 4, 5, 7, 9, 10) or "injunctive relief" (§ 8). In contrast is § 3, where the so-called "yellow dog contract" is declared to be not enforceable in the federal courts by "the granting of legal or equitable relief." Congress might have more broadly withdrawn all "equitable relief" in § 7, and its use instead of the phrase "temporary or permanent injunction," in view of the clear desire for stringency in this Act, suggests that a narrower intent was deliberate.

More significant is the fact that the Norris-LaGuardia Act has been interpreted as not even withdrawing all "injunctive relief." *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949). Those cases might once have been explainable as resting upon special factors in the terms or history of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*); but the Supreme Court has quite recently extended the power to enjoin racial discrimination exercised in the *Graham* case to the case of a union subject to the National Labor Relations Act, apparently considering the possible differences between the two Acts as not [fol. 38] worthy of comment. *Syres v. Oil Workers Union*, 350 U.S. 892 (1955).

Basically, it is the language and background of the Norris-LaGuardia Act itself which point to the conclusion that the restrictions of § 7 do not have to be met as a prerequisite to jurisdiction to grant an order compelling arbitration. Section 7 requires certain preliminary allegations and findings: a threat of unlawful acts leading to substantial injury to property, greater injury to complainant in denying relief than to defendants in granting it, and the inability of the public officials charged with protection of property to furnish adequate protection. Procedural requirements include notice to said public officials and an undertaking for reimbursement by complainant and a surety. These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. See also § 9. The enumerated requisites, which draw a logical line in relation to union conduct in strikes and

picketing (and perhaps to some employer activities), are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom, if ever, could be made either affirmatively or negatively. They just do not sensibly apply. We do not believe Congress intended § 7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts.

Congress had no hostility to arbitration as such, as is demonstrated by § 8 of the Norris-LaGuardia Act, which denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such dispute . . . with the aid of any available governmental machinery of mediation or voluntary arbitration." See *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.R.*, 321 U.S. 50 [fol. 39] (1944). Indeed, the general purpose of the Act to encourage the development of free collective bargaining, while it should not be taken broadly as an argument for an interpretation excluding from the coverage of the Act all decrees for specific performance of contracts, may properly be invoked as additional support for our conclusion with respect to specific performance of the promise to arbitrate, as was done in *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (S.D. N.Y. 1954), appeal dismissed 224 F. 2d 176 (C.A. 2d, 1955), and *Local 207 v. Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954). See also *Virginian Ry. Co. v. System Federation No. 40*, supra, 300 U.S. at 563; Comment, 21 U. Chi. L. Rev. 251, 258-61 (1954).

Many of the cases dealing with demands for equitable enforcement of collective bargaining agreements have simplified the problem of the Norris-LaGuardia Act by use of what was deemed to be the appropriate label—"injunction," to deny relief, or "specific performance," to grant it—and they have tended not to distinguish between different types of equitable remedies in this regard. Therefore, we have not been persuaded by such cases denying relief as *Associated Telephone Co., Ltd. v. Communication Workers*, supra; *International Longshoremen's Union v. Libby, McNeill & Libby*, 114 F. Supp. 249, 115 F. Supp. 123 (D. Hawaii 1953), aff'd on other grounds 221 F.2d 225 (C.A. 9th, 1955.)

Nor does our conclusion rest on similar decisions granting relief, such as *Textile Workers Union v. Alcoa Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950); *Milk Drivers Union v. Gillespie Milk Products Corp.*, 203 F.2d 650 (C.A. 6th, 1953).

Other cases, correct on their own facts, have often been cited, erroneously we think, as authority for denying equitable relief in all circumstances. *E.g., Alcoa Steamship Co., Inc. v. McMahon, supra* (§ 4 activity, as in the *Mead* case); *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183 (C.A. 4th, 1948) (unfair labor practice). In addition, [fol. 40] there are cases which are frequently cited in support of the grant of an equitable remedy, although they seem only to have assumed that some equitable relief could be given, without mentioning the Norris-LaGuardia Act. See *AFL v. Western Union Telegraph Co.*, 179 F.2d 535 (C.A. 6th, 1950); *Textile Workers Union v. Arista Mills Co.*, 193 F.2d 529, 534 (C.A. 4th, 1951). Also silent on the effect of the Norris-LaGuardia Act were some of the cases dealing with the United States Arbitration Act (9 U.S.C. §§ 1 *et seq.*), which will be discussed below.

Thus we do not consider that our answer to the Norris-LaGuardia problem was either foreclosed or required by prior authority. It is supported directly by a few cases, one of which, although citing opinions on which we do not rely, aptly summed up the analysis made above: "The general structure, detailed provisions, declared purposes, and legislative history of that statute [Norris-LaGuardia Act] show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953); cf. *Local 207 v. Landers, Frary & Clark*, supra, 119 F.Supp. at 879; *Wilson Bros. v. Textile Workers Union*, supra, 132 F.Supp. at 165-66.

One final objection to our ruling should be discussed. It has been argued in these cases that no arbitration order could be given against a union under the Norris-LaGuardia Act, and therefore that the concept of mutuality of remedy requires that the same order against the employer be denied. The reply is two-fold. Our ruling herein, that an

order to compel arbitration is neither barred specifically by § 4 nor subject to the requirements of § 7, means that such an order could be granted against either party to a labor dispute without violating the Act. The same is true [fol. 41] of an order to stay a lawsuit in favor of arbitration. If the union's breach of an arbitration promise should take the form of a strike; however, our prior holding in the *Mead* case applies, so that the order to arbitrate could not be accompanied by an injunction against the strike. Continuation of the strike theoretically is not a barrier to an arbitration, although practically it may be, in some cases, either because the employer deems it unfair to arbitrate in the face of a strike or because an arbitrator will not sit in those circumstances. See Cox, "Grievance Arbitration in the Federal Courts," 67 Harv. L. Rev. 591, 603-06 (1954). But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy. See *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.R.*, *supra*; 321 U.S. at 62-63; *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, C.A. 1st, March 6, 1956. In the second place, although the Norris-LaGuardia Act is not a "one-way street" (see S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932)), it certainly was intended and has application mainly as a protection for union and employee activities. Where its terms can be read to include employer conduct, that conduct should also be protected. See Wollett and Wellington, "Federalism and Breach of the Labor Agreement," 7 Stan. L. Rev. 445, 456 n. 59 (1955). But a realistic view of the way labor relations are carried on shows that there are few instances where this is the case. It would therefore be anomalous to read into the Act a requirement of exact mutuality of remedies, whatever force that concept may have in other contexts. Equitable relief against any party, if available under the holding of this opinion, must be molded, where necessary, to stay out of the "forbidden territory" delimited by the Norris-LaGuardia Act. Cf. *Fitzgerald v. Abramson*, 89 F. Supp. 504, 512 (S.D. N.Y. 1950).

[fol. 42]

II

This case is not disposed of by holding that the Norris-LaGuardia Act does not negative the existence of jurisdiction, for the plaintiff cannot prevail in the end unless there is also an affirmative basis upon which to grant the remedy sought. In view of its disposition of the Norris-LaGuardia issue, the court below did not reach this question. Since it is purely a question of law, and was fully briefed and argued here, we proceed to resolve it in the first instance.

Preliminary to our task, however, is the choice of law problem: In this suit under § 301, do we look to federal or state sources to determine the availability of specific enforcement as remedy for breach of a promise to arbitrate? This is the problem largely left open by our second opinion in *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, decided March 6, 1956, wherein we held that § 301 was a constitutional exercise of the power of Congress to confer jurisdiction on the lower federal courts, regardless of the source of the law used to resolve certain issues determinative of the merits of a § 301 case. We did suggest certain specific points, by way of illustration, as to which federal law would certainly rule the controversy, even though Congress might perhaps have chosen to leave other matters to be determined by an application of state law—a point we found it unnecessary to determine.

Of course, if § 301 created a “generally applicable and uniform federal substantive right,” as well as “a remedy . . . and . . . a forum in which to enforce it,” as the enactment was described in *Shirley-Herman Co., Inc. v. International Hod Carriers Union*, 182 F.2d 806, 809 (C.A. 2d, 1950), then there would be no question that federal law is applicable to all issues, whether deemed substantive or procedural.

If, on the other hand, a federal court in a § 301 case may have to determine at least some substantive issues by reference to state law—which possibly is so—then the problem of choice of law governing the “forms and mode” of enforcing an arbitration agreement must necessarily be faced. Our answer in that event is in accord with the reasoning of Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, *supra*, 113 F. Supp. at 141-42, rely-

ing on "the traditional rule that the availability of specific performance is a matter not of right, but of remedy, and that like other matters of remedy it is governed by the law of the forum. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109. . . ."

However, we must fit this conclusion into the analysis of arbitration enforcement recently made by the Supreme Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). In that case, a damage action based on a written contract for the employment of an individual that included an arbitration clause, jurisdiction was founded solely on diversity of citizenship. One issue was the applicability of the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to the question of whether the lawsuit should be stayed in favor of arbitration. The Supreme Court held that "the remedy by arbitration . . . substantially affects the cause of action created by the State," 350 U.S. at 203, thereby invoking the test of *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945), so that the question for that reason had to be decided according to state law, as if the district court were "only another court of the State." In our opinion the ruling in the *Bernhardt* case has no bearing on a suit under § 301. As we explained in our second opinion in the *Mead* case; *supra*, decided March 6, 1956, jurisdiction in a § 301 case is not based upon diversity of citizenship. Rather, it is based upon that provision of Art. III of the Constitution which extends the judicial power of the United States to cases "in Law and Equity, arising under . . . the Laws of the United States. . . ."

Prior to the *Erie* decision, it was well accepted that the [fol. 44] means for enforcing an arbitration agreement properly fell in the category of remedy or procedure. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123-25 (1924) (state statute); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 277-79 (1943) (U.S. Arbitration Act.) The *York* case, while recognizing that such questions normally are for the forum's own law, ruled that questions otherwise classified as questions of remedy and procedure must be determined in a diversity case according to state law when they may substantially affect the outcome of the case. That opinion and its progeny down to the *Bernhardt* case have empha-

sized the special demands of the diversity jurisdiction, as explained in the *Erie* and *York* opinions, as the basis for their rulings, and have given some indications of intent to limit to diversity cases their extensive reference to state "procedural" law. E.g., see *Guaranty Trust Co. v. York*, supra, 326 U.S. at 101; *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 202-03, 208. In other cases, considerations relevant to diversity suits have been held inapplicable where federal jurisdiction rested on other grounds, so that state procedural rules were not carried over even though the case involved some use of state law; *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946), or was founded on a state cause of action for wrongful death adopted as part of the "general maritime law" enforceable in admiralty, *Levinson v. Deupree*, 345 U.S. 648 (1953). See *Doucette v. Vincent*, 194 F.2d 834, 842 n. 6 (C.A. 1st, 1952). Therefore we believe that in a § 301 case the *Erie*, *York* and *Bernhardt* decisions do not require us to apply state law concerning the "forms and mode" of enforcing an arbitration agreement.

This conclusion drawn from examination of the post-*Erie* cases is reenforced by recalling that the remedial powers of a federal court in a labor controversy are sharply restricted. The many limitations thrown up by provisions of Title 28, by the Norris-LaGuardia Act, and by § 301 itself must be [fol. 45] complied with in any event, as the first section of this opinion illustrates. Cf. *Guaranty Trust Co. v. York*, supra, 326 U.S. at 105. Reference in addition to state law for the availability and forms of specific enforcement would complicate and hamper the district court's observance of the limits Congress has imposed. That is especially true because the enforceability of arbitration agreements varies considerably among the states. Some grant no specific enforcement, others expressly deny it to collective bargaining contracts; many limit enforcement to agreements submitting an existing dispute, others enforce agreements to submit future disputes only if restricted to disputes that could be the subject of a lawsuit. Few states have provisions of effective scope for specific enforcement of labor arbitration promises. See Gregory and Orlikoff, "The Enforcement of Labor Arbitration Agreements," 17 U. Chi. L. Rev. 233, 240-42 (1950). In Massachusetts, it is not at all clear what

is the present status of such enforcement. See Mass. G.L. (Ter. Ed.) C. 251, § 14, *Sanford v. Boston Edison Co.*, 316 Mass. 631, 636 (1944); Mass. G. L. (Ter. Ed.) C. 150, § 11, *Maglizzzi v. Handschumacher & Co.*, 327 Mass. 569 (1951); Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arb. J. (N.S.) 5, 9-13 (1953).

### III

This brings us to the availability and appropriateness, as a federal equitable remedy in a § 301 case, of a decree for specific performance of an agreement to arbitrate. In this connection, we do not forget the historic hostility of the judges, both at common law and in equity, to agreements for the submission of disputes to arbitration, and their manifested unwillingness to give such agreements full effect. Thus, while a valid award was enforceable at law or in equity, failure to satisfy all of the numerous formal or procedural rules would render an award invalid. Specific [fol. 46] performance of a submission to arbitration was granted if the submission had been made a rule of court or was limited to subsidiary issues in a lawsuit. But the specific enforcement of arbitration in general was barred by a pair of complementary rules that left nominal damages as the only remedy for breach of the promise to arbitrate: A submission was revocable by either party until the award was rendered; an agreement to submit future disputes to arbitration was invalid as an ouster of the jurisdiction of the courts. See Gregory and Orlikoff, *supra* at 235-38.

These rules were long embedded in the decisions of the federal, as well as state and English, courts. See *Red Cross Line v. Atlantic Fruit Co.*, *supra*, 264 U.S. at 120-23; *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (S.D.N.Y. 1915). A generation or more ago Congress and many state legislatures were persuaded by the advocates of arbitration to reject this body of doctrine by enacting arbitration statutes. In perhaps only two states was the change accomplished by judicial overruling of the common-law restrictions on specific enforcement. See Gregory and Orlikoff, *supra* at 254. That history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitra-

tion agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing. But cf. *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 209-12 (concurring opinion).

Practical grounds support this conclusion. A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitrator, stay and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could over-[fol. 47] rule the common law bars to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration.

A number of courts have held that § 301 itself is a legislative authorization for decrees of specific performance of arbitration agreements. E.g., *Textile Workers Union v. American Thread Co.*, supra; *Wilson Bros. v. Textile Workers Union*, supra; *Local 207 v. Landers, Frary & Clark*, supra; *The Evening Star Newspaper Co. v. Columbia Typographical Union*, 124 F. Supp. 322 (D.D.C. 1954); cf. *Milk Drivers Union v. Gillespie Milk Products Corp.*, supra. We think that is reading too much into the very general language of § 301. The terms and legislative history of § 301 sufficiently demonstrate, in our view, that it was not intended either to create any new remedies or to deny applicable existing remedies. See H.R. Rep. No. 245, 80th Cong., 1st Sess., 46 (1947); H.R. Rep. No. 510 (Conference Report), 80th Cong., 1st Sess. 42 (1947); 93 Cong. Rec. 3734, 6540 (daily ed. 1947). Arbitration was scarcely mentioned at all in the legislative history. Furthermore, the same practical consideration that militates against judicial overruling of the common law doctrine applies against interpreting § 301 to give that effect. The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of an arbitration agreement. Lacking are the procedural specifications needed for administration of the power to compel arbitration. For example, in the *American Thread* case Judge Wyzanski deemed the U.S. Arbitration Act inapplicable

eable, but no sooner had he ruled that § 301 authorized a decree for specific performance than he was faced with the need to adopt "as a guiding analogy" the procedure of § 5 of the U. S. Arbitration Act with respect to one such detail, the appointment of an arbitrator. 113 F. Supp. at 142. [fol. 48] Thus it seems to us that a firmer statutory basis than § 301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements.

#### IV

The federal statute that does contain an integrated system for compelling arbitration is the United States Arbitration Act, first passed in 1925 (43 Stat. 883) and then codified and enacted into positive law as Title 9 of the U. S. Code in 1947 (61 Stat. 669), with one subsequent technical amendment (68 Stat. 1233).

The structure of the Act is as follows: Section 2, subject to definitions and an exclusion in § 1, provides that:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

If a suit is brought in a federal court, and the court "being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," § 3 requires that it "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," providing the applicant is not in default in proceeding with the arbitration. And specific performance, the remedy sought in the instant case, is authorized in § 4 in these terms:

[fol. 49] "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any

United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

That section goes on to detail the procedure for litigating defenses to such an order. Further details of procedure in court and before the arbitrator are given in §§ 6-8, 12-13. As already noted, § 5 provides a method for appointing an arbitrator, where necessary. Finally, §§ 9-11 state the effect of an award and detail the grounds for confirming, vacating, modifying, or correcting an award.

The heart of the Act is contained in §§ 2, 3, 4. Although each of them states its scope in different terms, it has now been authoritatively held that § 2 defines the scope of § 3, on a basis that implicitly reaches § 4, as well. *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 201-02. Thus the remedy of an original action for specific performance under § 4 is available only as to an arbitration agreement contained in the types of contracts defined by § 2 as qualified by § 1.

It is not usual terminology to refer to a labor contract as "evidencing a transaction involving commerce," but the *Bernhardt* opinion suggests that under proper circumstances an individual contract of hire would meet the test of § 2. For the Court ruled § 2 inapplicable to the situation of the particular employee involved in that case by saying (350 U.S. at 200-01) :

"Nor does this contract evidence 'a transaction involving commerce' within the meaning of § 2 of the Act. There is no showing that petitioner while performing [fol. 50] his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."

If the employment contract there involved would have been subject to § 2 had such a showing been made, then a collective bargaining contract should *a fortiori* be held to be within the scope of § 2. Although it does not consummate the employment relationship, which may be the "transac-

tion," the collective agreement sets the terms and conditions under which not one but hundreds or thousands of workers are employed, and thus "involves" commerce to a greater degree than any single hiring transaction could. Cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). We conclude that a collective bargaining agreement may be within the terms of § 2. See Sturges and Murphy, "Some Confusing Matters Relating to Arbitration under the United States Arbitration Act," 17 Law & Contemp. Prob. 580, 617-19 (1952); Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 598-99. Perhaps this is not so with respect to a collective bargaining agreement whose arbitration clause is not limited to controversies "arising out of such contract or transaction, or the refusal to perform the whole or any part therof," as provided in § 2 of the Arbitration Act. See *Metal Polishers Union v. Rubin*, 85 F. Supp. 363 (E.D.Pa. 1949). We express no opinion on that question; the arbitration clause in suit is limited to "Any matter involving the application or interpretation of any provisions of this Agreement. . . ."

Section 2, however, must be read in connection with § 1, which, after defining "maritime transactions" and "commerce" in familiar terms, concludes with these enigmatic words:

[fol. 51] "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The *Bernhardt* case indicates clearly that this exclusion pertains to the entire Act. 350 U.S. at 201-02. We have then reached the ultimate major question of this appeal: Is a collective bargaining agreement a "contract of employment" within the meaning of § 1? We hold that it is not.

The term in question admittedly is not a "word of art" with a fixed technical definition, but it seems more familiar today as an equivalent to what once was called the "contract of hire," referring to an individual transaction, rather than as a generic term that would also embrace union-negotiated collective agreements. The distinction between

the two concepts (and a suggestion of the difficulty of definition) appears in a well-known quotation from Mr. Justice Jackson's opinion for the Supreme Court in *J. I. Case Co. v. NLRB*, *supra*, 321 U.S. at 334-35:

"Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a *contract of employment* except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a *contract of employment*."  
[Italics added.]

[fol. 52] Compare the language used in § 3 of the Norris-LaGuardia Act to define a "yellow dog contract," which of course would not be a union contract: "Every undertaking . . . in any contract or agreement of hiring or employment between any [employer] . . . and any employee or prospective employee. . . ." (47 Stat. 70) But see *Amalgamated Assn. v. Pennsylvania Greyhound Lines, Inc.*, 191 F. 2d 310, 313 (C.A. 3d, 1951), 65 Harv. L. Rev. 1239 (1952). See also Cox, "Grievance Arbitration in the Federal Courts," *supra*, 67 Harv. L. Rev. at 595-97.

If the words of § 1 do not have a "plain meaning," the legislative history does not conclusively make them plainer. The committee reports and hearings in the Congress which passed the Act contain only one reference—an ambiguous one—to the meaning of the exclusion. See Joint Hearings before Subcommittees of Committees on Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 21 (1924); S. Rep. 536 and H.R. Rep. 646, 68th Cong., 1st Sess. (1924). The whole tenor of these documents, however, demonstrates that congressional attention was being directed at that time solely toward the field of commercial arbitration. The history of the arbitration bill before the previous Congress and in the American Bar Association committee which had

drafted it shows that the exclusion was inserted to overcome an objection by the Seamen's Union. But even this bit of history is ambiguous as to whether the objection was made with reference to union arbitration or individual arbitration of seamen's wage disputes. Compare *Tenney Engineering, Inc. v. United Electrical Workers*, 207 F. 2d 450, 452 (C.A. 3d, 1953, with 65 Harv. L. Rev. 1240. When this basically weak type of legislative history is conceivably explainable on other grounds, such as objection to a new form of arbitration for seamen's individual contracts of hire (see 46 U.S.C. § 651), we cannot attribute much force to it against a reading of the statutory language itself.

[fol. 53] Court decisions are divided on the breadth of the exclusion in § 1 of the U. S. Arbitration Act. Three circuits have held that it includes collective bargaining agreements. *Amalgamated Assn. v. Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (C.A. 3d, 1951); *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F. 2d 221 (C.A. 4th, 1954); *Lincoln Mills v. Textile Workers Union*, 230 F. 2d 81 (C.A. 5th, 1956). See also *Mercury Oil Refining Co. v. Oil Workers Union*, 187 F. 2d 980, 983 (C.A. 10th, 1951); *Shirley-Herman Co., Inc. v. International Hod Carriers Union*, 182 F. 2d 806, 809 (C.A. 2d, 1950). But cf. *Markel Electric Products, Inc. v. United Electrical Workers*, 202 F. 2d 435 (C.A. 2d, 1953). Despite this position, the Third Circuit will apply the Act to most collective bargaining contracts, on its view that the exclusion only refers to collective agreements of transportation workers. *Tenney Engineering, Inc. v. United Electrical Workers*, 207 F. 2d 459 (C.A. 3d, 1953).

On the other hand, the Sixth Circuit, while denying a stay under § 3 on other grounds, has squarely ruled that the exclusion covers only a "contract for the hiring of individuals," distinguishing its earlier cases apparently as being suits for wages upon contracts of hire incorporating the terms of a collective bargaining agreement. *Hoover Motor Express Co., Inc. v. Teamsters Union*, 217 F. 2d 49, 52-53 (C.A. 6th, 1954). Accord, *Lewittes & Sons v. United Furniture Workers*, 95 F. Supp. 851 (S.D.N.Y. 1951); see *United Electrical Workers v. Oliver Corp.*, 205 F. 2d 376, 385 (C.A. 8th, 1953); *Wilson Bros. v. Textile Workers Union*, supra, 132 F. Supp. at 165 (S.D.N.Y.); *Tenney Engineering, Inc.*

v. *United Electrical Workers*, *supra*, 207 F. 2d at 454-55 (concurring opinion). The question was expressly passed over in the *American Thread* case, *supra*, 113 F. Supp. at 139.

With the legislative history and judicial treatment in the condition just described, we feel free to consider the statutory provision as carrying its own full meaning in what it says. The term "contracts of employment" serves to define in part the scope of a statute which created a governing code for a newly important system of adjudicating controversies, and which has assumed permanent status by codification. It may well be that the attention of Congress was focused on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration. Nevertheless, in enacting the Arbitration Act, Congress chose not to use apt language to confine the application of the Act to the field of commercial arbitration. If it be assumed that only in the period subsequent to 1925 did arbitration under collective bargaining agreements emerge as a factor of major importance, the most that could be inferred from that would be that Congress did not specifically advert to arbitration under collective bargaining agreements. But such inference would not be enough to warrant an interpretation excluding collective bargaining agreements from the coverage of the Arbitration Act. It would be necessary to go further and to conclude that, had Congress in 1925 foreseen the developing importance of arbitration under collective bargaining agreements, it "would have so varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico v. The Shell Co.*, 302 U.S. 253, 257 (1937). There is no reason to suppose that this would have been so. Therefore, we hold that the exclusion in § 1 does not embrace collective bargaining agreements, as distinguished from individual "contracts of employment;" and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act.

Some of those limitations have already been noted. Another which must be discussed is the provision of § 4 which authorizes specific enforcement of an agreement to arbitrate by a district court "which, save for such agreement, would

[fol. 55] have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties. . . ." [Italics added.] *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955), has sharply curtailed the subject-matter jurisdiction of federal courts under § 301 to adjudicate directly between union and employer a controversy over "terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." One court has already held that if the district court is barred by the *Westinghouse* decision from granting pecuniary relief on a wage controversy, it also lacks jurisdiction, by the terms of § 4, to compel arbitration of that dispute, *Textile Workers Union v. Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). However, the effect of the *Westinghouse* holding, reflected in all the opinions of the majority justices, was to eliminate from § 301 jurisdiction a complaint by a union that involves no more than a cause of action which is "peculiar in the individual benefit" or "the uniquely personal right of an employee" or which "arises from the individual contract between the employer and employee." 348 U.S. at 460, 461, 464. That holding was not aimed at any cause of action or remedy that appropriately pertains to the union as an entity, particularly one which an individual employee may have no equal power to enforce. The promise of the employer to arbitrate, which frequently is linked in the contract or in negotiations with a union no-strike pledge, seems to us to be at the forefront of the contract terms for whose breach only the union can effectively seek redress; and for whose breach § 301 should therefore still be an appropriate source of jurisdiction. Indeed, the history of litigation under § 301 shows that if cases seeking to compel an employer to arbitrate were thrown into the discard along with [fol. 56] *Westinghouse*-type cases and those barred for trenching on exclusive NLRB jurisdiction, there would be no significant use a union could make of § 301. Its terms and legislative history demonstrate that, as we have earlier said of the Norris-LaGuardia Act, it was not intended to be strictly a "one-way street." The *Westinghouse* opinions show no intent to create any such result. It seems to us therefore

that that decision is to be interpreted as denying jurisdiction over a controversy only where the union is seeking a remedy, usually a judgment for damages, which the individual employee equally could enforce in a suit on his personal cause of action. On that analysis, "Jurisdiction . . . of the subject matter of a suit arising out of the controversy" will exist so long as the union is not asking for the relief available to the individual employee, and thus the test of § 4 will be satisfied by a complaint which meets the terms of § 301 itself; Cf. *Wilson Bros. v. Textile Workers Union*, *supra*, 132 F. Supp. at 166.

## V

The case will therefore be remanded for further proceedings under the Arbitration Act. Since our decision makes clear for the first time in this circuit that that Act is applicable, the district court should now permit the parties to amend their pleadings so as to allege, respectively, compliance with the requisites of the Act and defenses afforded by it.

We have not passed upon the question of the arbitrability of the two grievances at issue here, although counsel for defendant informed us that the Company denies that they are arbitrable under the contract. Arbitrability is a question which the district court must pass on in the first instance. By way of guidance, it may be appropriate to note here a brief comment on some general principles. The scope of an arbitration pledge is solely for the parties to [fol. 57] set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation. See, e.g., *International Union United Furniture Workers v. Colonial Hardwood Flooring Co., Inc.*, 168 F. 2d 33 (C.A. 4th, 1948); *Markel Electric Products, Inc. v. United Electrical Workers*, *supra* (majority and dissenting opinions). However, an arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable therein and

whether the applicant has satisfied the contract procedures prerequisite to arbitration. See, e.g., *Wilson Bros. v. Textile Workers Union*, supra, 132 F. Supp. at 164-65; *Insurance Agents' Union v. Prudential Ins. Co.*, 122 F. Supp. 869, 872 (E.D.Pa. 1954). Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief under §§ 3 or 4 of the Arbitration Act. If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§ 10-11 of the Act. See, e.g., *Local 379 v. Jacobs Mfg. Co.*, 120 F. Supp. 228 (D. Conn. 1953). See also *Goodall-Sanford, Inc. v. United Textile Workers*, No. 5029, decided today.

## VI

Plaintiff has submitted a motion to this court, under 28 U.S.C. § 1653, to amend its complaint so as to allege diversity of citizenship between all the members of the Union [fol. 58] and defendant, no doubt as a hedge against a ruling that relief could not be granted under the law applicable to a federal question case. In view of our decision, this motion may have become moot, but it must in any event be denied, for it cannot accomplish the result intended. Rule 17(b) F.R.C.P.; *Donahue v. Kenney*, 327 Mass. 409 (1951); *Worthington Pump & Machinery Corp. v. Local 259*, 63 F. Supp. 411, 413 (D. Mass. 1945).

*The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.*

## IN UNITED STATES COURT OF APPEALS

JUDGMENT—April 25, 1956

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District

Court is vacated, and the case is remanded to that Court for further proceedings not inconsistent with the opinion passed down this day.

By the Court: (S) Roger A. Stinchfield, Clerk.

[fol. 59] IN UNITED STATES COURT OF APPEALS

Thereafter, on May 10, 1956, mandate was stayed until further order of Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] SUPREME COURT OF THE UNITED STATES—October Term, 1956

No. 276

GENERAL ELECTRIC COMPANY, Petitioner

vs.

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, (U.E.)

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration or decision of this application.

Supreme Court, U.S.  
FILED

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**Supreme Court of the United States**

**Comm. v. New York 1956**

**No. 2761**

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IN THE  
**Supreme Court of the United States**

October Term 1956

No.

**GENERAL ELECTRIC COMPANY,**

PETITIONER

vs.

**LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (U.E.)**

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

The petitioner, General Electric Company, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the First Circuit entered in the above cause on April 25, 1956.<sup>1</sup>

**OPINIONS BELOW**

The opinion of the Court of Appeals, which is reprinted hereinafter as Appendix B, is reported in 233 F. 2d 85. The opinion of the District Court (R. 22-27)

<sup>1</sup> On the same day the court decided the companion cases of *Newspaper Guild v. Boston Herald-Traveler Corp.*, 233 F. 2d 102, and *Goodall-Sanford, Inc. v. United Textile Workers*, 233 F. 2d 104, both involving the same questions raised in the present case. A petition for a writ of certiorari is also being filed in the *Goodall-Sanford* case.

is reported in 129 F. Supp. 665. It appears herein-after as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1956 (R. 58). On May 10, 1956, the mandate was stayed until further order of the court (R. 59). The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

## QUESTIONS PRESENTED

1. Whether, in an action brought by a union under §301 (a) of the Labor Management Relations Act of 1947, a federal district court has jurisdiction to compel arbitration, by virtue of the United States Arbitration Act, of individual employee grievances pursuant to the terms of a collective bargaining agreement between the union and the employer.
2. Whether, despite the provisions of the Norris-LaGuardia Act, a federal district court has jurisdiction to grant an injunction compelling arbitration of grievances "involving or growing out of a labor dispute".

## STATUTES INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§141-187, of the United States Arbitration Act, 61 Stat. 669, 9 U.S.C. §§1-14, as amended, and of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§101-115, are set forth in Appendix A.

## STATEMENT

Petitioner, General Electric Company (hereinafter referred to as "the Company"), is a New York corpo-

ration having a manufacturing plant at Ashland, Massachusetts (R. 13). It engages in, and its activities at its Ashland plant affect, interstate commerce (R. 13). The respondent, Ideal 205, United Electrical, Radio and Machine Workers of America (U.E.) (hereinafter referred to as "the Union") is a voluntary unincorporated labor union with its principal office in Ashland, Massachusetts (R. 13). It has been certified by the National Labor Relations Board, and is recognized by the Company, as the collective bargaining agent for hourly rated production and maintenance workers employed by the Company at its Ashland plant (R. 13).

The Union and the Company entered into an agreement (which was in full force and effect at all times relevant hereto) establishing hours, rates of pay and working conditions for hourly-rated production and maintenance workers at the Company's Ashland plant (R. 13; Exhibit A, R. 8). The agreement provided a four-step procedure for the settlement of employee grievances (Agreement, Art. XII, R. 8). It further provided that "any matter involving the application or interpretation of any provisions of this Agreement", with certain specific exceptions, "may be submitted to arbitration by either the Union or of the Company", by written notice given after the decision in the fourth step of the grievance procedure (R. 14-15; Agreement, Art. XIII, R. 8).

On April 2, 1954, the Union filed a written grievance that one Boiardi, an employee at the Ashland plant, was being paid at a lower rate of pay than that specified in his job classification (R. 15), and on August 13, 1954, a written grievance that another employee at the Ashland plant, one Armstrong, had been discharged arbitrarily and not for cause (R. 17). Both these grievances were carried through the fourth step of the

grievance procedure, and, not having obtained results satisfactory to it, the Union notified the Company that it was submitting these grievances to arbitration (R. 15, 17). The Company advised the Union of its refusal to arbitrate these grievances (R. 16, 17), taking the position that they were not arbitrable under the terms of the arbitration clause.

Thereupon the Union brought the present action in the United States District Court for the District of Massachusetts, alleging in its amended complaint that the action arose under §§301 (a)-(c) of the Labor Management Relations Act of 1947, and praying that the Company be required to submit the grievances to arbitration and for damages (R. 13-18). The Company moved to strike that portion of the prayer for relief asking that it be compelled to arbitrate, on the ground that the court had no jurisdiction to grant that remedy (R. 18-19). The District Court granted the motion (R. 27), holding that the Norris-LaGuardia Act precluded the granting of an injunction to compel arbitration of an alleged breach of a collective bargaining agreement (R. 22-26). The Union then moved to amend its amended complaint so as to eliminate any prayer for damages (R. 28). This motion was allowed, and, since the complaint as thus amended sought only an order directing the Company to arbitrate, the District Court, in accordance with its earlier ruling, entered final judgment dismissing the action for want of jurisdiction (R. 29).

On appeal, the Court of Appeals reversed (R. 58), holding that, although the controversy between the parties involved a "labor dispute" within the meaning of the Norris-LaGuardia Act, nevertheless the provisions of §7 of that Act were not applicable to an action to compel arbitration of grievances under a written contract. The court then proceeded to consider whether

there was any basis on which a federal court could order enforcement of the arbitration agreement. On this question it held: (a) that in an action under §301 (a) of the Labor Management Relations Act, the availability of the remedy of specific enforcement of an agreement to arbitrate was to be determined by federal, not state, law, distinguishing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); (b) that in the absence of an explicit statutory basis, federal courts could not enforce executory agreements to arbitrate; (c) that no such statutory basis was created by §301 (a) of the Labor Management Relations Act itself; (d) that the United States Arbitration Act, however, provided an integrated system for compelling arbitration; (e) that the arbitration provision in the collective bargaining agreement in question was "a contract evidencing a transaction involving commerce" within the meaning of §2 of the Act and was not excluded from the operation of the Act by §1 thereof as a "contract of employment" of "workers engaged in foreign or interstate commerce"; and (f) that the remedy of specific enforcement, provided by §4 of the Act, was available. Accordingly it remanded the case to the District Court for further proceedings.<sup>2</sup>

## REASONS FOR GRANTING THE WRIT.

This case presents important questions of federal law as to the scope of §301 (a) of the Labor Management Relations Act of 1947 and as to the applicability of the United States Arbitration Act and of the Norris-LaGuardia Act to actions brought under that section

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<sup>2</sup> Obviously the court's ruling as to the enforceability of the arbitration provision is "fundamental to the further conduct of the case". Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Land v. Dollar*, 330 U.S. 731, 734 (1947).

to enforce arbitration provisions of collective bargaining agreements. On these important questions the decision of the court below conflicts with decisions rendered in other circuits and with applicable decisions of this Court.

I. In holding that, in an action brought by a union under §301 (a) of the Labor Management Relations Act of 1947, a federal district court is empowered by the United States Arbitration Act to compel an employer to arbitrate individual employee grievances pursuant to the provisions of a collective bargaining agreement, the Court below has rendered a decision in square conflict with the decision of the Court of Appeals for the Fifth Circuit in *Lincoln Mills of Alabama v. Textile Workers Union of America*, 230 F. 2d 81 (5th Cir. 1956), which is now pending before this Court on a petition for a writ of certiorari. Not only is there a divergence of views between the First and Fifth Circuits on this ultimate question, but on most of the subsidiary issues involved the lower federal courts have reached widely different and conflicting results. These issues are as follows:

1. *Whether the United States Arbitration Act is applicable to arbitration provisions contained in a collective bargaining agreement.* As the opinion of the court below notes, there is a sharp division of opinion among the Circuits on the question whether the exclusionary provision of §1 of the Act, that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce", covers collective bargaining agreements. The Second, Third, Fourth and Fifth Circuits have taken the position that

collective bargaining agreements are "contracts of employment" within the meaning of that proviso; *Signal-Stat Corporation v. Local 475, United Electrical, Radio & Machine Workers*, BNA Daily Labor Report No. 131, p. F-1 (2d Cir. July 2, 1956); see *Shirley-Herman Co. v. International Hod Carriers, etc. Union*, 182 F. 2d 806, 809 (2d Cir. 1950); *Amalgamated Ass'n. v. Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (3d Cir. 1951); *Pennsylvania Greyhound Lines, Inc. v. Amalgamated Ass'n.*, 193 F. 2d 327 (3d Cir. 1952); *United Electrical, Radio & Machine Workers v. Miller Metal Products, Inc.*, 215 F. 2d 221 (4th Cir. 1954); *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (4th Cir. 1948); *Lincoln Mills of Alabama v. Textile Workers Union*, 230 F. 2d 81 (5th Cir. 1956). The Tenth Circuit, without having decided the question squarely, has indicated its approval of this view. *Mercury Oil Co. v. Oil Workers Int'l. Union*, 187 F. 2d 980, 983 (10th Cir. 1951). The Sixth Circuit, like the court below, has recently taken the contrary position, *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc., Local No. 327*, 217 F. 2d 49 (6th Cir. 1954), distinguishing its own earlier decision holding the Act inapplicable to collective bargaining agreements (*Gutliff Coal Co. v. Cox*, 142 F. 2d 876 (6th Cir. 1944)).

While the Second and Third Circuits agree that collective bargaining agreements are "contracts of employment" within the meaning of the Act, they have held, however, that the exclusionary clause of §1 applies only to agreements covering workers actually engaged in transportation industries. *Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers*, 207 F. 2d 450 (3d Cir. 1953); *Signal-Stat Corporation v. Local 475, United Electrical, Radio & Machine Work-*

ers, BNA Daily Labor Report No. 131, p. F-1 (2d Cir. July 2, 1956).<sup>3</sup>

2. Whether, even if collective bargaining agreements are covered by the Arbitration Act, the remedy of specific enforcement provided by §4 of the Act is available in an action in which the jurisdiction of the federal court depends on 301 (a) of the Labor Management Relations Act of 1947. In holding that the remedy under §4 was available in the present case, the court below overlooked the plain language of that section and reached a decision in conflict with decisions in other circuits and with the decision of this Court in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 (1955).

Section 4 of the Act authorizes enforcement of agreements to arbitrate by any federal court "which, save for such agreement, would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties . . ." (Italics supplied). In holding that the remedy of specific enforcement is available if the district court has jurisdiction under §301 (a) of the Labor Management Relations Act, the court below ignored the express requirements that there must be "jurisdiction under Title 28", and its decision thus conflicts with the decisions in other circuits holding the Arbitration Act unavailable in actions in which the jurisdictional requisites of Title 28 were not present. *Amalgamated Ass'n v. Southern Bus Lines*, 189 F. 2d 219 (5th Cir. 1951); *Mengel Co. v. Nashville Paper Products & Spe-*

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<sup>3</sup> The Seventh Circuit, in a very recent case has "assumed, without deciding" that §3 of the Arbitration Act is applicable to a collective bargaining agreement. See *Cuneo Press, Inc. v. Kokomo Paper Handlers' Union*, BNA Daily Labor Report, No. 130, p. E-1 (7th Cir. July 2, 1956).

*cialty Workers Union*, 221 F. 2d 644 (6th Cir. 1955); *Watkins v. Hudson Coal Co.*, 54 F. Supp. 953 (M. D. Pa. 1944) *mod.* and *aff'd* 153 F. 2d 311 (3d Cir. 1945) *cert. denied* 327 U.S. 777 (1946); *Textile Workers Union v. Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). See also *Krauss Brothers Lumber Co. v. Louis Bossert & Sons*, 62 F. 2d 1004, 1006 (2d Cir. 1933); *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825, 828 (S.D. N.Y. 1946), *aff'd* 163 F. 2d 310 (2d Cir. 1947).

If, however, the court below had been right in assuming that "the test of §4 will be satisfied by a complaint which meets the terms of §301 itself" (Appendix B, *infra*, p. 46), its conclusion that the test was met in the present case runs afoul of this Court's decision in *Westinghouse*. Stating that the *Westinghouse* decision "was not aimed at any cause of action or remedy that appropriately pertains to the union", it concluded that here the district court had jurisdiction under §301 (a) since the subject matter of the controversy between the Union and the Company was the Company's promise to arbitrate, for breach of which only the union could effectively seek relief. But this reasoning overlooks the requirement of §4 of the Arbitration Act that the district court must have jurisdiction over a controversy "*save for such agreement*" to arbitrate. Since jurisdiction is to be tested as if no agreement to arbitrate existed, the "controversy between the parties" to which §4 refers cannot be the dispute as to whether the agreement to arbitrate shall be enforced. It is the merits of the dispute which the plaintiff seeks to have arbitrated. Here that dispute involved the rate of one employee's pay and the propriety of another employee's discharge. Over the subject matter of that controversy, relating to the "uniquely personal right" of an employee, the district court would have no juris-

diction in an action brought by the union under §301 (a). *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 (1955).

3. Whether a federal district court has jurisdiction under §301 (a) of the Labor Management Relations Act of an action seeking only injunctive or equitable relief. In the present action the Union's amended complaint sought only an order compelling arbitration. The court below assumed, without discussion, that §301 (a) authorizes actions to obtain only equitable relief, a point left open in its earlier decision in *W. L. Mead Co., Inc. v. International Brotherhood of Teamsters*, 217 F. 2d 6, 9 (1st Cir. 1954). The lower federal courts have sharply divided as to the availability of equitable relief in an action brought under §301 (a). Many have held, in the light of the legislative history and the language and context of that section, that it authorizes only suits for damages and that no equitable relief was either intended or provided for. *International Longshoremen's Union v. Sunset Line & Twine Co.*, 77 F. Supp. 119 (N.D. Cal. 1948); *United Packing House Workers v. Wilson & Co.*, 80 F. Supp. 563 (N.D. Ill. 1948); *Associated Tel. Co. v. Communication Workers*, 114 F. Supp. 334 (S.D. Calif. 1953); *International Longshoremen's etc. Union v. Libby, McNeil & Libby*, 114 F. Supp. 249 (D. Hawaii 1953), motion for new trial denied 115 F. Supp. 123, *aff'd* 221 F. 2d 225 (9th Cir. 1955); *Pilot Freight Carriers, Inc. v. Bayne*, 124 F. Supp. 605 (W.D.S.C. 1954); see *Haspel v. Bonnaz, Singer & Hand Embroiderers*, 112 F. Supp. 944, 946 (S.D. N.Y. 1953), *aff'd* 216 F. 2d 192 (2d Cir. 1954). Others, without adequate analysis or consideration of the legislative history, have held to the contrary. *Milk and Ice Cream Drivers Union v. Gillespie Milk Products Corp.*, 203

F.2d 650 (6th Cir. 1953); *Mountain States Div.*, No. 17 v. *Mountain States Tel. & Tel. Co.*, 81 F. Supp. 397 (D. Colo. 1948); *Textile Workers Union v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M. D. N. C. 1950); *The Evening Star Newspaper Co. v. Columbia Typographical Union*, 124 F. Supp. 322 (D.C. 1954).

4. Whether, in an action brought under § 301(a) of the Labor Management Relations Act, the enforceability of an agreement to arbitrate is to be determined by federal or state law. In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 (1955), this Court left open the question whether rights under collective bargaining agreements are created by state or federal law, and, if the former, whether Congress can constitutionally provide for their enforcement in a federal forum in the absence of diversity of citizenship. The divergence of views in the lower federal courts on these questions is shown by the cases cited in Mr. Justice Frankfurter's opinion in *Westinghouse* (348 U. S. 437, 452 n. 26). The court below avoided determination of this problem by holding that, even if state law did govern substantive issues in an action under § 301(a), enforcement of an arbitration agreement was solely a matter of "forms and mode" of procedure, as to which federal procedural law applied. But that view is squarely opposed to this Court's holding in *Bernhardt v. Polygraphic Co.*, 350 U. S. 198 (1956), that reference to arbitration is not a "form of trial" but goes to the substance of the cause of action. It is true, as the court below pointed out, that the *Bernhardt* case was a diversity case. But if in actions brought under § 301(a) a federal court is enforcing state created rights, the same constitutional difficulties

to which this Court adverted in the *Bernhardt* case would appear to be present.

II. Even if the provisions of a collective bargaining agreement could otherwise be enforced in an action brought under §301 (a) of the Labor Management Relations Act, there remains the important question as to the application of the Norris-LaGuardia Act to actions to compel arbitration of controversies involving a "labor dispute". The court below concluded that that Act does not bar "the swift effective injunctive remedy" in such actions, holding that the requirements of §7 of that Act were aimed "at an order which prohibits or restricts unilateral coercive action" (Appendix B, p. 26, *infra*), and that here they "just do not sensibly apply" because the express findings required by that section "seldom, if ever, could be made affirmatively or negatively" in an action to enforce an arbitration clause (Appendix B, p. 28, *infra*). Although the First Circuit appears to be the only Court of Appeals which has discussed this precise question as applied to an arbitration provision,<sup>4</sup> the lower federal courts differ

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<sup>4</sup> In *Lincoln Mills of Alabama v. Textile Workers Union*, 230 F. 2d 81, 84 (5th Cir. 1956) the court stated, without any discussion, that the Norris-LaGuardia Act would not prevent granting the relief there sought. It does not appear, however, that the point had been raised or argued by the parties, or that the court fully considered the question.

Decisions of the district courts in other circuits are divided on the question, some holding the Act bars orders compelling arbitration (*Local 937, Int'l Union United Automobile, etc. Workers v. Royal Typewriter Co.*, 88 F. Supp. 669 (D. Conn. 1949); *United Steelworkers v. Galland-Henning Machine Co.*, 139 F. Supp. 630 (E. D. Wis. 1956)); others holding the Act inapplicable (*Local 207, United Electrical, Radio & Machine Workers v. Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954); *The Evening Star Newspaper Co. v. Columbia Typographical Union*, 124 F. Supp. 322 (D. C. 1954); *Wilson Brothers v. Textile Workers Union*, 132 F. Supp. 163 (S.D. N.Y. 1954)).

widely as to the application of the Act to injunctions to enforce other provisions of collective bargaining agreements. While some have concluded that the Act is inapplicable (see, e.g., *Milk and Ice Cream Drivers Union v. Gillespie Milk Products Corp.*, 203 F. 2d 650 (6th Cir. 1953); *Mountain States Tel. & Tel. Co.*, 81 F. Supp. 397 (D. Colo. 1948); *Textile Workers Union v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D. N.C. 1950), there is a substantial body of decisions holding that §7 of the Act precludes an order compelling an employer or a union to perform such an agreement. See, e.g., *Alcoa S. S. Co. v. McMahon*, 81 F. Supp. 541 (S.D. N.Y. 1948), *aff'd* 173 F. 2d 567 (2d Cir. 1949), *cert. denied* 338 U.S. 821 (1949); *United Packing House Workers v. Wilson & Co.*, 80 F. Supp. 563 (N.D. Ill. 1948); *Wilson Employees' Representation Plan v. Wilson & Co.*, 53 F. Supp. 23 (S.D. Cal. 1943); *Duris v. Phelps Dodge Copper Products Corp.*, 87 F. Supp. 229 (D.N.J. 1949); *Castle & Cooke Terminals v. Local 137, International Longshoremen's etc. Union*, 110 F. Supp. 247 (D. Hawaii 1953). Moreover, many other cases, contrary to the court below, have held that the requirements of §7 must be complied with in situations where the conduct sought to be enjoined did not involve a strike or picketing or any "unilateral coercive action". *Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*, 126 F. 2d 931 (10th Cir. 1942) (mandatory injunction requiring resumption of business relations and interchange of freight); *Southeastern Motor Lines v. Hoover Truck Co.*, 34 F. Supp. 390 (M.D. Tenn. 1940) (same); *California Ass'n of Employers v. Building and Construction Trades Council*, 178 F. 2d 175 (9th Cir. 1949). (mandatory injunction requiring defendant to engage in collective bargaining); *Amazon Cotton Mill Co. v. Textile Work-*

*ers Union*, 167 F. 2d 183 (4th Cir. 1948) (same). Indeed, the court below itself recognized that its reasoning could not be pressed logically to the point of "excluding from the coverage of the Act all decrees for specific performance" (Appendix B, *infra*, p. 29). What it did was to carve out a single term of the contract — that relating to arbitration — as exempt from the provisions of the Act.

In reaching its conclusion, it misinterpreted the recent decision of this Court in *Syres v. Oil Workers Union*, 350 U.S. 892 (1955). Although noting that this Court's earlier decisions in *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937) and *Graham v. Brotherhood of Firemen*, 338 U.S. 232 (1949), which sustained the granting of injunctions to enforce rights under the Railway Labor Act, may have rested upon the special terms and history of that Act, it thought that the *Syres* case extended the authority to grant injunctions without regard to the Norris-LaGuardia Act. Clearly the *Syres* case did nothing of the kind. In that action, which sought not only injunctive relief, but damages and a declaratory judgment as well, jurisdiction was invoked under 28 U.S.C. §1331. No question whatever as to the applicability of the Norris-LaGuardia Act was raised. The District Court dismissed the entire complaint on the ground that the cause of action, if any, did not arise under the Constitution, laws or treaties of the United States. The Court of Appeals affirmed. In reversing and remanding to the District Court for further proceedings, this Court in no way indicated that the District Court should grant an injunction without compliance with the requirements of the Norris-LaGuardia Act.

III. The foregoing questions of federal law are important questions and should be settled by this Court. Provisions for arbitration of grievances are now commonly included in labor contracts, and their use over the past ten years has steadily been increasing. (See, e.g. the statistics referred to in the dissenting opinion in *Lincoln Mills of Alabama v. Textile Workers Union*, 230 F.2d 81, 94, n. 14). As the growing volume of litigation involving such provisions attests, the lower federal courts are being more and more plagued with the difficult problems as to whether any remedy is available in the federal courts to compel arbitration, and if so, by virtue of what law. The many cases cited above show the discordant answers which have been given. Only this Court can resolve these issues, which are of great importance in the field of labor relations to unions and employers alike.

### CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

### STATUTES INVOLVED

**LABOR MANAGEMENT RELATIONS ACT, 1947, 61 STAT. 156  
29 U.S.C. § 185**

**SEC. 301.** (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity, and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of action and proceeding by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principle office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

UNITED STATES ARBITRATION ACT, 43 Stat. 883, re-enacted  
61 Stat. 669, 9 U.S.C. §§ 1-14, as amended by Act of  
September 3, 1954, 68 Stat. 1233.

*"Maritime transactions" and "commerce" defined;  
exceptions to operation of title*

SEC. 1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

*Validity, Irrevocability, and Enforcement of Agreements to Arbitrate*

SEC. 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination*

SEC. 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have

jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

NORRIS-LA GUARDIA ACT, 47 Stat. 70, 29 U.S.C. §§ 101-115.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity

with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect —

- (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;
- (b) That substantial and irreparable injury to complainant's property will follow;
- (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;
- (d) That complainant has no adequate remedy at law; and
- (e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant

shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant, and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

## APPENDIX B

# United States Court of Appeals For the First Circuit

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No. 4980.

LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (UE),

~~PLAINTIFF, APPELLANT,~~

v.

GENERAL ELECTRIC COMPANY,  
(TELECHRON DEPARTMENT, ASHLAND, MASSACHUSETTS),  
~~DEFENDANT, APPELLEE.~~

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS.

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Before MAGRUDER, *Chief Judge*, and WOODBURY and  
HARTIGAN, *Circuit Judges.*

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## OPINION OF THE COURT.

April 25, 1956.

MAGRUDER, *Chief Judge.* This case, together with two others also decided today, presents the question of whether a federal district court has authority, under § 301 of the Labor Management Relations Act of 1947 (61 Stat. 156), to compel an employer to arbitrate a dispute in accordance with the terms of a collective bargaining agreement between such "employer and a labor organization representing employees in an industry affecting commerce."

Plaintiff-appellant is an unincorporated labor organization representing employees of defendant Company at a plant in Ashland, Mass., which is, without dispute, in an industry affecting commerce, within the meaning of the Act. Article XII of the collective bargaining agreement in effect between the parties at the relevant dates established a conventional four-step procedure for adjustment of employee grievances between the Union and the Company, by which negotiation was to continue at progressively higher levels if an agreement was not reached. Article XIII provided:

"1. Any matter involving the application or interpretation of any provisions of this Agreement which shall not include a matter involving establishing of wage rates, general increases or production standards may be submitted to arbitration by either the Union or the Company. . . . "

The Article required written notice of intention to submit an unresolved grievance to arbitration within 30 days after the decision rendered in step 4 of the grievance procedure, and it went on to describe certain procedural matters and restrictions on the scope of the arbitrator's authority. He was limited, in so far as relevant here, to "interpretation, application, or determining compliance with the provisions of this Agreement but he shall have no authority to add to, detract from, or in any way alter the provisions of this Agreement."

Two grievances filed by the Union in 1954 are the subject of its present suit. One involved a dispute over whether an employee named Boiardi was employed in a certain job classification carrying a higher rate of pay than he in fact was receiving; the other involved the propriety of the discharge of an employee named Armstrong for refusing to clean certain machines when he asserted that such work

was in addition to his regular duties. After unsuccessfully prosecuting these matters through the procedure of Art. XII, the Union duly notified the Company in each case of its desire to arbitrate, but the Company refused to submit to arbitration either the merits of the two grievances or the disputed issue of whether they were arbitrable under the provisions of Art. XIII first quoted above. The Union then filed its complaint in the district court, alleging jurisdiction under § 301. It sought as to each of the grievance cases an order "that defendant be required specifically to perform its agreement to arbitrate" and damages. After the district court granted a motion to strike the claims for equitable relief, the amended complaint was again amended to eliminate the damage claims. This was done so that no question could be raised as to the appealability of the decision. Plaintiff's appeal is properly here, under 28 U.S.C. § 1291, from the final order of April 27, 1955, which dismissed the complaint for want of jurisdiction, the district judge being of the view that he was forbidden by the Norris-LaGuardia Act (47 Stat. 70) from issuing the requested order to compel arbitration of the two disputes. See 129 F. Supp. 665.

## I.

In any case where equitable relief in some form is sought in the context of a controversy involving labor relations, a federal court must inquire whether the Norris-LaGuardia Act has withdrawn the jurisdiction of the district court to grant the desired remedy. See *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, 217 F.2d 6 (1954), in which case we affirmed an order denying a temporary injunction against a strike and picketing alleged to be in breach of a collective bargaining agreement. We held that § 301 had not repealed by implication the withdrawal of jurisdiction to enjoin the activities listed in § 4 of the Norris-LaGuardia Act even in a case where such activities constitute

a breach of contract. The present case presents a different problem, for the activity against which relief is sought, refusal to arbitrate, can in no way be fitted into any of the classes enumerated in § 4. However, consideration must also be given to § 7 of the Norris-LaGuardia Act, the relevant parts of which are set forth in the footnote.\* See also §§ 8 and 9: If it is not implicit in our discussion in the *Mead* case, *supra*, we now affirm that our determination there that enactment of § 301 did not by implication repeal § 4 of the Norris-LaGuardia Act applies as well as to § 7 and indeed to the whole of that Act. It is in this light that one must read the dictum in the *Mead* opinion (217 F.2d at 9) that "equitable relief may sometimes be given in terms which do not trench upon the interdictions of § 4 of the Norris-LaGuardia Act." That is, any such equitable relief to be given in a suit brought under § 301 must also not "trench upon the interdictions of" § 7, when that section

\* "Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge hereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

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and the Act of which it is a part are applicable according to their own terms.

In recognition of this situation, it has sometimes been argued that a suit to remedy a breach of contract does not involve or grow out of a "labor dispute." This argument cannot be accepted, in the face of the sweeping definitions of § 13, which set the scope of the Norris-LaGuardia Act. (47 Stat. 73) Any controversy between an employer and a union "concerning terms or conditions of employment" is included, "and no less so because the dispute is one that may be resolved or determined on its merits by reference to the terms of a collective bargaining agreement." *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, supra, 217 F.2d at 8, and cases cited; see Note, 37 Va. L. Rev. 739, 746 (1951).

Nevertheless, it is our conclusion that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act. Although the present controversy is a "labor

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Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. . . . " (47 Stat. 71-72)

dispute" within the scope of the Act as defined in § 13; the relief sought is not the "temporary or permanent injunction" against whose issuance the formidable barriers of § 7 are raised. Of course, the label used to describe the judicial command is not controlling. We would not rest by saying that an order to arbitrate is a "decree for specific performance" in contradistinction to a "mandatory injunction," for each term has been attached so frequently to this type of relief that neither can be rejected out of hand as an inappropriate characterization of it. But see 2 Pomeroy, Equitable Remedies § 2057 (2d ed. 1919). For reasons to be developed below, we believe that the "injunction" at which § 7 was aimed is the traditional "labor injunction," typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute. E.g., *Alcoa Steamship Co., Inc. v. McMahon*, 81 F. Supp. 541 (S.D. N.Y. 1948), aff'd 173 F.2d 567 (C.A. 2d, 1949); *Associated Telephone Co., Ltd. v. Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953). An order to compel arbitration of an existing dispute, or to stay a pending lawsuit over the dispute so that arbitration may be had, as redress for one party's breach of a prior agreement to submit such disputes to arbitration, seems to have a different character, whatever name is given to it. Cf. *Sanford v. Boston Edison Co.*, 316 Mass. 631 (1944); *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (C.A. 5th, 1956) (arbitration order denied on other grounds).

It should be noted in passing that the Supreme Court has recently reaffirmed its ruling that an order denying a stay of an action for damages in favor of arbitration is "refusal of an 'injunction' under" 28 U.S.C. § 1292. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 180 (1955). Whether the same characterization would be applied to an order affirmatively compelling arbitration need not be decided, for the *Baltimore Contractors* case and its predeces-

sors were treating the stay order as an "injunction" only for the purpose of determining appealability under 28 U.S.C. § 1292(1), as is obvious from the opinions. What is an "injunction" for that statutory test would seem to have little relevance to what is an "injunction" in the wholly different context of the Norris-LaGuardia Act. Cf. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 452 (1935). See also *Goodall-Sanford, Inc. v. United Textile Workers*, No. 5029, decided today.

It is significant, while still at the verbal level, that within the Norris-LaGuardia Act itself a distinction is made in the breadth of the bars imposed on equitable relief. The sections that might be relevant here all deny jurisdiction to issue an "injunction" (§§ 4, 5, 7, 9, 10) or "injunctive relief" (§ 8). In contrast is § 3, where the so-called "yellow dog contract" is declared to be not enforceable in the federal courts by "the granting of legal or equitable relief." Congress might have more broadly withdrawn all "equitable relief" in § 7, and its use instead of the phrase "temporary or permanent injunction," in view of the clear desire for stringency in this Act, suggests that a narrower intent was deliberate.

More significant is the fact that the Norris-LaGuardia Act has been interpreted as not even withdrawing all "injunctive relief." *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949). Those cases might once have been explainable as resting upon special factors in the terms or history of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*); but the Supreme Court has quite recently extended the power to enjoin racial discrimination exercised in the *Graham* case to the case of a union subject to the National Labor Relations Act, apparently considering the possible differences between the two Acts as not worthy

of comment. *Syres v. Oil Workers Union*, 350 U.S. 892 (1955).

Basically, it is the language and background of the Norris-LaGuardia Act itself which point to the conclusion that the restrictions of § 7 do not have to be met as a prerequisite to jurisdiction to grant an order compelling arbitration. Section 7 requires certain preliminary allegations and findings: a threat of unlawful acts leading to substantial injury to property, greater injury to complainant in denying relief than to defendants in granting it, and the inability of the public officials charged with protection of property to furnish adequate protection. Procedural requirements include notice to said public officials and an undertaking for reimbursement by complainant and a surety. These provisions were obviously aimed to limit injunctions to cases involving violent or destructive acts. See also § 9. The enumerated requisites, which draw a logical line in relation to union conduct in strikes and picketing (and perhaps to some employer activities), are not at all compatible with the situation where one party merely demands that the other be compelled to arbitrate a grievance in accordance with a contract provision for arbitration, in which latter situation the required findings seldom, if ever, could be made either affirmatively or negatively. They just do not sensibly apply. We do not believe Congress intended § 7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts.

Congress had no hostility to arbitration as such, as is demonstrated by § 8 of the Norris-LaGuardia Act, which denies injunctive relief to any complainant "who has failed to make every reasonable effort to settle such dispute . . . with the aid of any available governmental machinery of mediation or voluntary arbitration." See *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.R.*, 321 U.S. 50

(1944). Indeed, the general purpose of the Act to encourage the development of free collective bargaining, while it should not be taken broadly as an argument for an interpretation excluding from the coverage of the Act all decrees for specific performance of contracts, may properly be invoked as additional support for our conclusion with respect to specific performance of the promise to arbitrate, as was done in *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. 163 (S.D. N.Y. 1954), appeal dismissed 224 F.2d 176 (C.A. 2d, 1955), and *Local 207 v. Landers, Frary & Clark*, 119 F. Supp. 877 (D. Conn. 1954). See also *Virginian Ry. Co. v. System Federation No. 40*, supra, 300 U.S. at 563; Comment, 21 U. Chi. L. Rev. 251, 258-61 (1954).

Many of the cases dealing with demands for equitable enforcement of collective bargaining agreements have simplified the problem of the Norris-LaGuardia Act by use of what was deemed to be the appropriate label—"injunction," to deny relief, or "specific performance," to grant it—and they have tended not to distinguish between different types of equitable remedies in this regard. Therefore, we have not been persuaded by such cases denying relief as *Associated Telephone Co., Ltd. v. Communication Workers*, supra; *International Longshoremen's Union v. Libby, McNeill & Libby*, 114 F. Supp. 249, 115 F. Supp. 123 (D. Hawaii 1953), aff'd on other grounds 221 F.2d 225 (C.A. 9th, 1955). Nor does our conclusion rest on similar decisions granting relief, such as *Textile Workers Union v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950); *Milk Drivers Union v. Gillespie Milk Products Corp.*, 203 F.2d 650 (C.A. 6th, 1953).

Other cases, correct on their own facts, have often been cited, erroneously we think, as authority for denying equitable relief in all circumstances. E.g., *Alcoa Steamship Co., Inc. v. McMahon*, supra (§ 4 activity, as in the *Mead* case); *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183 (C.A. 4th, 1948) (unfair labor practice). In addition,

there are cases which are frequently cited in support of the grant of an equitable remedy, although they seem only to have assumed that some equitable relief could be given, without mentioning the Norris-LaGuardia Act. See *AFL v. Western Union Telegraph Co.*, 179 F.2d 535 (C.A. 6th, 1950); *Textile Workers Union v. Arista Mills Co.*, 193 F.2d 529, 534 (C.A. 4th, 1951). Also silent on the effect of the Norris-LaGuardia Act were some of the cases dealing with the United States Arbitration Act (9 U.S.C. §§ 1 *et seq.*) which will be discussed below.

Thus we do not consider that our answer to the Norris-LaGuardia problem was either foreclosed or required by prior authority. It is supported directly by a few cases, one of which, although citing opinions on which we do not rely, aptly summed up the analysis made above: "The general structure, detailed provisions, declared purposes, and legislative history of that statute [Norris-LaGuardia Act] show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953); cf. *Local 207 v. Landers, Frary & Clark*, supra, 119 F. Supp. at 879; *Wilson Bros. v. Textile Workers Union*, supra, 132 F. Supp. at 165-66.

One final objection to our ruling should be discussed. It has been argued in these cases that no arbitration order could be given against a union under the Norris-LaGuardia Act, and therefore that the concept of mutuality of remedy requires that the same order against the employer be denied. The reply is two-fold. Our ruling herein, that an order to compel arbitration is neither barred specifically by § 4 nor subject to the requirements of § 7, means that such an order could be granted against either party to a labor dispute without violating the Act. The same is true

of an order to stay a lawsuit in favor of arbitration. If the union's breach of an arbitration promise should take the form of a strike, however, our prior holding in the *Mead* case applies, so that the order to arbitrate could not be accompanied by an injunction against the strike. Continuation of the strike theoretically is not a barrier to an arbitration, although practically it may be, in some cases, either because the employer deems it unfair to arbitrate in the face of a strike or because an arbitrator will not sit in those circumstances. See Cox, "Grievance Arbitration in the Federal Courts," 67 Harv. L. Rev. 591, 603-06 (1954). But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy. See *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R.R.*, supra, 321 U.S. at 62-63; *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, C.A. 1st, March 6, 1956. In the second place, although the Norris-LaGuardia Act is not a "one-way street" (see S. Rep. No. 163, 72d Cong., 1st Sess. 19 (1932)), it certainly was intended and has application mainly as a protection for union and employee activities. Where its terms can be read to include employer conduct, that conduct should also be protected. See Wollett and Wellington, "Federalism and Breach of the Labor Agreement," 7 Stan. L. Rev. 445, 456 n. 59 (1955). But a realistic view of the way labor relations are carried on shows that there are few instances where this is the case. It would therefore be anomalous to read into the Act a requirement of exact mutuality of remedies, whatever force that concept may have in other contexts. Equitable relief against any party, if available under the holding of this opinion, must be molded, where necessary, to stay out of the "forbidden territory" delimited by the Norris-LaGuardia Act. Cf. *Fitzgerald v. Abramson*, 89 F. Supp. 504, 512 (S.D. N.Y. 1950).

## II.

This case is not disposed of by holding that the Norris-LaGuardia Act does not negative the existence of jurisdiction, for the plaintiff cannot prevail in the end unless there is also an affirmative basis upon which to grant the remedy sought. In view of its disposition of the Norris-LaGuardia issue, the court below did not reach this question. Since it is purely a question of law, and was fully briefed and argued here, we proceed to resolve it in the first instance.

Preliminary to our task, however, is the choice of law problem: In this suit under § 301, do we look to federal or state sources to determine the availability of specific enforcement as remedy for breach of a promise to arbitrate? This is the problem largely left open by our second opinion in *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, decided March 6, 1956, wherein we held that § 301 was a constitutional exercise of the power of Congress to confer jurisdiction on the lower federal courts, regardless of the source of the law used to resolve certain issues determinative of the merits of a § 301 case. We did suggest certain specific points, by way of illustration, as to which federal law would certainly rule the controversy, even though Congress might perhaps have chosen to leave other matters to be determined by an application of state law—a point we found it unnecessary to determine.

Of course, if § 301 created a “generally applicable and uniform federal substantive right,” as well as “a remedy . . . and . . . a forum in which to enforce it,” as the enactment was described in *Shirley-Herman Co., Inc. v. International Hod Carriers Union*, 182 F.2d 806, 809 (C.A. 2d, 1950), then there would be no question that federal law is applicable to all issues, whether deemed substantive or procedural.

If, on the other hand, a federal court in a § 301 case may have to determine at least some substantive issues by refer-

ence to state law—which possibly is so—then the problem of choice of law governing the “forms and mode” of enforcing an arbitration agreement must necessarily be faced. Our answer in that event is in accord with the reasoning of Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, *supra*, 113 F. Supp. at 141-42, relying on “the traditional rule that the availability of specific performance is a matter not of right, but of remedy, and that like other matters of remedy it is governed by the law of the forum. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109. . . . ”

However, we must fit this conclusion into the analysis of arbitration enforcement recently made by the Supreme Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). In that case, a damage action based on a written contract for the employment of an individual that included an arbitration clause, jurisdiction was founded solely on diversity of citizenship. One issue was the applicability of the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to the question of whether the lawsuit should be stayed in favor of arbitration. The Supreme Court held that “the remedy by arbitration . . . substantially affects the cause of action created by the State,” 350 U.S. at 203, thereby invoking the test of *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945), so that the question for that reason had to be decided according to state law, as if the district court were “only another court of the State.” In our opinion the ruling in the *Bernhardt* case has no bearing on a suit under § 301. As we explained in our second opinion in the *Mead* case, *supra*, decided March 6, 1956, jurisdiction in a § 301 case is not based upon diversity of citizenship. Rather, it is based upon that provision of Art. III of the Constitution which extends the judicial power of the United States to cases “in Law and Equity, arising under . . . the Laws of the United States. . . . ”

Prior to the *Erie* decision, it was well accepted that the

means for enforcing an arbitration agreement properly fell in the category of remedy or procedure. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123-25 (1924) (state statute); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 277-79 (1943) (U. S. Arbitration Act). The *York* case, while recognizing that such questions normally are for the forum's own law, ruled that questions otherwise classified as questions of remedy and procedure must be determined in a diversity case according to state law when they may substantially affect the outcome of the case. That opinion and its progeny down to the *Bernhardt* case have emphasized the special demands of the diversity jurisdiction, as explained in the *Erie* and *York* opinions, as the basis for their rulings, and have given some indications of intent to limit to diversity cases their extensive reference to state "procedural" law. E.g., see *Guaranty Trust Co. v. York*, supra, 326 U.S. at 101; *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 202-03, 208. In other cases, considerations relevant to diversity suits have been held inapplicable where federal jurisdiction rested on other grounds, so that state procedural rules were not carried over even though the case involved some use of state law, *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), or was founded on a state cause of action for wrongful death adopted as part of the "general maritime law" enforceable in admiralty, *Levinson v. Deupree*, 345 U.S. 648 (1953). See *Doucette v. Vincent*, 194 F.2d 834, 842 n. 6 (C.A. 1st, 1952). Therefore we believe that in a § 301 case the *Erie*, *York* and *Bernhardt* decisions do not require us to apply state law concerning the "forms and mode" of enforcing an arbitration agreement.

This conclusion drawn from examination of the post-*Erie* cases is reenforced by recalling that the remedial powers of a federal court in a labor controversy are sharply restricted. The many limitations thrown up by provisions of Title 28, by the Norris-LaGuardia Act, and by § 301 itself must be

complied with in any event, as the first section of this opinion illustrates. Cf. *Guaranty Trust Co. v. York*, *supra*, 326 U.S. at 105. Reference in addition to state law for the availability and forms of specific enforcement would complicate and hamper the district court's observance of the limits Congress has imposed. That is especially true because the enforceability of arbitration agreements varies considerably among the states. Some grant no specific enforcement, others expressly deny it to collective bargaining contracts; many limit enforcement to agreements submitting an existing dispute, others enforce agreements to submit future disputes only if restricted to disputes that could be the subject of a lawsuit. Few states have provisions of effective scope for specific enforcement of labor arbitration promises. See Gregory and Orlikoff, "The Enforcement of Labor Arbitration Agreements," 17 U. Chi. L. Rev. 233, 240-42 (1950). In Massachusetts, it is not at all clear what is the present status of such enforcement. See Mass. G.L. (Ter. Ed.) C. 251, § 14, *Sanford v. Boston Edison Co.*, 316 Mass. 631, 636 (1944); Mass. G.L. (Ter. Ed.) C. 150, § 11, *Maglizzi v. Handschumacher & Co.*, 327 Mass. 569 (1951); Cox, "Legal Aspects of Labor Arbitration in New England," 8 Arb. J. (N.S.) 5, 9-13 (1953).

### III.

This brings us to the availability and appropriateness, as a federal equitable remedy in a § 301 case, of a decree for specific performance of an agreement to arbitrate. In this connection, we do not forget the historic hostility of the judges, both at common law and in equity, to agreements for the submission of disputes to arbitration, and their manifested unwillingness to give such agreements full effect. Thus, while a valid award was enforceable at law or in equity, failure to satisfy all of the numerous formal or procedural rules would render an award invalid. Specific

performance of a submission to arbitration was granted if the submission had been made a rule of court or was limited to subsidiary issues in a lawsuit. But the specific enforcement of arbitration in general was barred by a pair of complementary rules that left nominal damages as the only remedy for breach of the promise to arbitrate: A submission was revocable by either party until the award was rendered; an agreement to submit future disputes to arbitration was invalid as an ouster of the jurisdiction of the courts. See Gregory and Orlikoff, *supra* at 235-38.

These rules were long embedded in the decisions of the federal, as well as state and English, courts. See *Red Cross Line v. Atlantic Fruit Co.*, *supra*, 264 U.S. at 120-23; *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (S.D.N.Y. 1915). A generation or more ago Congress and many state legislatures were persuaded by the advocates of arbitration to reject this body of doctrine by enacting arbitration statutes. In perhaps only two states was the change accomplished by judicial overruling of the common-law restrictions on specific enforcement. See Gregory and Orlikoff, *supra* at 254. That history convinces us that the hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements cannot now be ignored by us as a matter of federal law without a pretty explicit statutory basis for so doing. But cf. *Bernhardt v. Polygraphic Co.*, *supra*, 350 U.S. at 209-12 (concurring opinion).

Practical grounds support this conclusion. A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitrator, stay and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could over-

rule the common law bars to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration.

A number of courts have held that § 301 itself is a legislative authorization for decrees of specific performance of arbitration agreements. E.g., *Textile Workers Union v. American Thread Co.*, *supra*; *Wilson Bros. v. Textile Workers Union*, *supra*; *Local 207 v. Landers, Frary & Clark*, *supra*; *The Evening Star Newspaper Co. v. Columbia Typographical Union*, 124 F. Supp. 322 (D.D.C. 1954); cf. *Milk Drivers Union v. Gillespie Milk Products Corp.*, *supra*. We think that is reading too much into the very general language of § 301. The terms and legislative history of § 301 sufficiently demonstrate, in our view, that it was not intended either to create any new remedies or to deny applicable existing remedies. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 46 (1947); H.R. Rep. No. 510 (Conference Report), 80th Cong., 1st Sess. 42 (1947); 93 Cong. Rec. 3734, 6540 (daily ed. 1947). Arbitration was scarcely mentioned at all in the legislative history. Furthermore, the same practical consideration that militates against judicial overruling of the common law doctrine applies against interpreting § 301 to give that effect. The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of an arbitration agreement. Lacking are the procedural specifications needed for administration of the power to compel arbitration. For example, in the *American Thread* case, Judge Wyzanski deemed the U.S. Arbitration Act inapplicable, but no sooner had he ruled that § 301 authorized a decree for specific performance than he was faced with the need to adopt "as a guiding analogy" the procedure of § 5 of the U.S. Arbitration Act with respect to one such detail, the appointment of an arbitrator. 113 F. Supp. at 142. Thus it seems to us

that a firmer statutory basis than § 301 should be found to justify departure from the judicially formulated doctrines with reference to arbitration agreements.

#### IV.

The federal statute that does contain an integrated system for compelling arbitration is the United States Arbitration Act, first passed in 1925 (43 Stat. 883) and then codified and enacted into positive law as Title 9 of the U. S. Code in 1947 (61 Stat. 669), with one subsequent technical amendment (68 Stat. 1233).

The structure of the Act is as follows: Section 2, subject to definitions and an exclusion in § 1, provides that:

“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

If a suit is brought in a federal court, and the court “being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,” § 3 requires that it “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,” providing the applicant is not in default in proceeding with the arbitration. And specific performance, the remedy sought in the instant case, is authorized in § 4 in these terms:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

That section goes on to detail the procedure for litigating defenses to such an order. Further details of procedure in court and before the arbitrator are given in §§ 6-8, 12-13. As already noted, § 5 provides a method for appointing an arbitrator, where necessary. Finally, §§ 9-11 state the effect of an award and detail the grounds for confirming, vacating, modifying, or correcting an award.

The heart of the Act is contained in §§ 2, 3, 4. Although each of them states its scope in different terms, it has now been authoritatively held that § 2 defines the scope of § 3, on a basis that implicitly reaches § 4, as well. *Bernhardt v. Polygraphic Co.*, *supra*, 350 U.S. at 201-02. Thus the remedy of an original action for specific performance under § 4 is available only as to an arbitration agreement contained in the types of contracts defined by § 2 as qualified by § 1.

It is not usual terminology to refer to a labor contract as "evidencing a transaction involving commerce," but the *Bernhardt* opinion suggests that under proper circumstances an individual contract of hire would meet the test of § 2. For the Court ruled § 2 inapplicable to the situation of the particular employee involved in that case by saying (350 U.S. at 200-01):

"Nor does this contract evidence 'a transaction involving commerce' within the meaning of § 2 of the Act. There is no showing that petitioner while performing

his duties under the employment contract was working "in commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."

If the employment contract there involved would have been subject to § 2 had such a showing been made, then a collective bargaining contract should *a fortiori* be held to be within the scope of § 2. Although it does not consummate the employment relationship, which may be the "transaction," the collective agreement sets the terms and conditions under which not one but hundreds or thousands of workers are employed, and thus "involves" commerce to a greater degree than any single hiring transaction could. Cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *J. I. Case Co. v. NLRB* 321 U.S. 332 (1944). We conclude that a collective bargaining agreement may be within the terms of § 2. See Sturges and Murphy, "Some Confusing Matters Relating to Arbitration under the United States Arbitration Act," 17 Law & Contemp. Prob. 580, 617-19 (1952); Cox, "Grievance Arbitration in the Federal Courts," supra, 67 Harv. L. Rev. at 598-99. Perhaps this is not so with respect to a collective bargaining agreement whose arbitration clause is not limited to controversies "arising out of such contract or transaction, or the refusal to perform the whole or any part thereof," as provided in § 2 of the Arbitration Act. See *Metal Polishers Union v. Rubin*, 85 F. Supp. 363 (E.D.Pa. 1949). We express no opinion on that question; the arbitration clause in suit is limited to "Any matter involving the application or interpretation of any provisions of this Agreement. . . ."

Section 2, however, must be read in connection with § 1, which, after defining "maritime transactions" and "commerce" in familiar terms, concludes with these enigmatic words:

"but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The *Bernhardt* case indicates clearly that this exclusion pertains to the entire Act. 350 U.S. at 201-02. We have then reached the ultimate major question of this appeal: Is a collective bargaining agreement a "contract of employment" within the meaning of § 1? We hold that it is not.

The term in question admittedly is not a "word of art" with a fixed technical definition, but it seems more familiar today as an equivalent to what once was called the "contract of hire," referring to an individual transaction, rather than as a generic term that would also embrace union-negotiated collective agreements. The distinction between the two concepts (and a suggestion of the difficulty of definition) appears in a well-known quotation from Mr. Justice Jackson's opinion for the Supreme Court in *J. I. Case Co. v. NLRB*, supra, 321 U.S. at 334-35:

"Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a *contract of employment* except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a *contract of employment*."  
[Italics added.]

Compare the language used in § 3 of the Norris-LaGuardia Act to define a "yellow dog contract," which of course would not be a union contract: "Every undertaking . . . in any contract or agreement of hiring or employment between any [employer] . . . and any employee or prospective employee. . . ." (47 Stat. 70) But see *Amalgamated Assn. v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310, 313 (C.A. 3d, 1951), 65 Harv. L. Rev. 1239 (1952). See also Cox, "Grievance Arbitration in the Federal Courts," *supra*, 67 Harv. L. Rev. at 595-97.

If the words of § 1 do not have a "plain meaning," the legislative history does not conclusively make them plainer. The committee reports and hearings in the Congress which passed the Act contain only one reference—an ambiguous one—to the meaning of the exclusion. See Joint Hearings before Subcommittees of Committees on Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 21 (1924); S. Rep. 536 and H.R. Rep. 646, 68th Cong., 1st Sess. (1924). The whole tenor of these documents, however, demonstrates that congressional attention was being directed at that time solely toward the field of commercial arbitration. The history of the arbitration bill before the previous Congress and in the American Bar Association committee which had drafted it shows that the exclusion was inserted to overcome an objection by the Seamen's Union. But even this bit of history is ambiguous as to whether the objection was made with reference to union arbitration or individual arbitration of seamen's wage disputes. Compare *Tenney Engineering, Inc. v. United Electrical Workers*, 207 F.2d 450, 452 (C.A. 3d, 1953), with 65 Harv. L. Rev. 1240. When this basically weak type of legislative history is conceivably explainable on other grounds, such as objection to a new form of arbitration for seamen's individual contracts of hire (see 46 U.S.C. § 651), we cannot attribute much force to it against a reading of the statutory language itself.

Court decisions are divided on the breadth of the exclusion in § 1 of the U. S. Arbitration Act. Three circuits have held that it includes collective bargaining agreements. *Amalgamated Assn. v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (C.A. 3d, 1951); *United Electrical Workers, v. Miller Metal Products, Inc.*, 215 F.2d 221 (C.A. 4th, 1954); *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (C.A. 5th, 1956). See also *Mercury Oil Refining Co. v. Oil Workers Union*, 187 F.2d 980, 983 (C.A. 10th, 1951); *Shirley-Herman Co., Inc. v. International Hod Carriers Union*, 182 F.2d 806, 809 (C.A. 2d, 1950). But cf. *Markel Electric Products, Inc. v. United Electrical Workers*, 202 F.2d 435 (C.A. 2d, 1953). Despite this position, the Third Circuit will apply the Act to most collective bargaining contracts, on its view that the exclusion only refers to collective agreements of transportation workers. *Tenney Engineering, Inc. v. United Electrical Workers*, 207 F.2d 450 (C.A. 3d, 1953).

On the other hand, the Sixth Circuit, while denying a stay under § 3 on other grounds, has squarely ruled that the exclusion covers only a "contract for the hiring of individuals," distinguishing its earlier cases apparently as being suits for wages upon contracts of hire incorporating the terms of a collective bargaining agreement. *Hoover Motor Express Co., Inc. v. Teamsters Union*, 217 F.2d 49, 52-53 (C.A. 6th, 1954). Accord, *Lewittes & Sons v. United Furniture Workers*, 95 F. Supp. 851 (S.D.N.Y. 1951); see *United Electrical Workers v. Oliver Corp.*, 205 F.2d 376, 385 (C.A. 8th, 1953); *Wilson Bros. v. Textile Workers Union*, supra, 132 F. Supp. at 165 (S.D.N.Y.); *Tenney Engineering, Inc. v. United Electrical Workers*, supra, 207 F.2d at 454-55 (concurring opinion). The question was expressly passed over in the *American Thread* case, supra, 113 F. Supp. at 139.

With the legislative history and judicial treatment in the condition just described, we feel free to consider the statu-

tory provisions as carrying its own full meaning in what it says. The term "contracts of employment" serves to define in part the scope of a statute which created a governing code for a newly important system of adjudicating controversies, and which has assumed permanent status by codification. It may well be that the attention of Congress was focused on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration. Nevertheless, in enacting the Arbitration Act, Congress chose not to use apt language to confine the application of the Act to the field of commercial arbitration. If it be assumed that only in the period subsequent to 1925 did arbitration under collective bargaining agreements emerge as a factor of major importance, the most that could be inferred from that would be that Congress did not specifically advert to arbitration under collective bargaining agreements. But such inference would not be enough to warrant an interpretation excluding collective bargaining agreements from the coverage of the Arbitration Act. It would be necessary to go further and to conclude that, had Congress in 1925 foreseen the developing importance of arbitration under collective bargaining agreements, it "would have so varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico v. The Shell Co.*, 302 U.S. 253, 257 (1937). There is no reason to suppose that this would have been so. Therefore, we hold that the exclusion in § 1 does not embrace collective bargaining agreements, as distinguished from individual "contracts of employment," and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act.

Some of those limitations have already been noted. Another which must be discussed is the provision of § 4 which authorizes specific enforcement of an agreement to arbitrate by a district court "which, save for such agreement, would

have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties. . . .” [Italics added.] *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 460 (1955), has sharply curtailed the subject-matter jurisdiction of federal courts under § 301 to adjudicate directly between union and employer a controversy over “terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee.” One court has already held that if the district court is barred by the *Westinghouse* decision from granting pecuniary relief on a wage controversy, it also lacks jurisdiction, by the terms of § 4, to compel arbitration of that dispute. *Textile Workers Union v. Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955). However, the effect of the *Westinghouse* holding, reflected in all the opinions of the majority justices, was to eliminate from § 301 jurisdiction a complaint by a union that involves no more than a cause of action which is “peculiar in the individual benefit” or “the uniquely personal right of an employee” or which “arises from the individual contract between the employer and employee.” 348 U.S. at 460, 461, 464. That holding was not aimed at any cause of action or remedy that appropriately pertains to the union as an entity, particularly one which an individual employee may have no equal power to enforce. The promise of the employer to arbitrate, which frequently is linked in the contract or in negotiations with a union no-strike pledge, seems to us to be at the forefront of the contract terms for whose breach only the union can effectively seek redress, and for whose breach § 301 should therefore still be an appropriate source of jurisdiction. Indeed, the history of litigation under § 301 shows that if cases seeking to compel an employer to arbitrate were thrown into the discard along with

*Westinghouse*-type cases and those barred for trenching on exclusive NLRB jurisdiction, there would be no significant use a union could make of § 301. Its terms and legislative history demonstrate that, as we have earlier said of the Norris-LaGuardia Act, it was not intended to be strictly a "one-way street." The *Westinghouse* opinions show no intent to create any such result. It seems to us therefore that that decision is to be interpreted as denying jurisdiction over a controversy only where the union is seeking a remedy, usually a judgment for damages, which the individual employee equally could enforce in a suit on his personal cause of action. On that analysis, "Jurisdiction . . . of the subject matter of a suit arising out of the controversy" will exist so long as the union is not asking for the relief available to the individual employee, and thus the test of § 4 will be satisfied by a complaint which meets the terms of § 301 itself. Cf. *Wilson Bros. v. Textile Workers Union*, supra, 132 F. Supp. at 166.

## V.

The case will therefore be remanded for further proceedings under the Arbitration Act. Since our decision makes clear for the first time in this circuit that that Act is applicable, the district court should now permit the parties to amend their pleadings so as to allege, respectively, compliance with the requisites of the Act and defenses afforded by it.

We have not passed upon the question of the arbitrability of the two grievances at issue here, although counsel for defendant informed us that the Company denies that they are arbitrable under the contract. Arbitrability is a question which the district court must pass on in the first instance. By way of guidance, it may be appropriate to note here a brief comment on some general principles. The scope of an arbitration pledge is solely for the parties to

set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation. See, e.g., *International Union United Furniture Workers v. Colonial Hardwood Flooring Co., Inc.*, 168 F.2d 33 (C.A. 4th, 1948); *Markel Electric Products, Inc. v. United Electrical Workers*, *supra* (majority and dissenting opinions). However, an arbitration clause, either expressly or by broadly stating its scope to include disputed interpretations of any contract term, may refer the very question of arbitrability to the arbitrator for decision. That is, just as a court has jurisdiction to determine its own jurisdiction, the arbitrator in such a case has power to interpret the scope of the arbitration terms of the contract, including questions of whether the dispute at issue is made arbitrable therein and whether the applicant has satisfied the contract procedures prerequisite to arbitration. See, e.g., *Wilson Bros. v. Textile Workers Union*, *supra*, 132 F. Supp. at 164-65; *Insurance Agents' Union v. Prudential Ins. Co.*, 122 F. Supp. 869, 872 (E.D.Pa. 1954). Thus the district court must first determine whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the court. If it is the latter, the court must decide such points before it can give relief under §§ 3 or 4 of the Arbitration Act. If it is the former, and the applicant's claim of arbitrability is not frivolous or patently baseless, an order can be given, with the decision on arbitrability to be made in the arbitration proceedings that follow, subject of course to §§ 10-11 of the Act. See, e.g., *Local 379 v. Jacobs Mfg. Co.*, 120 F. Supp. 228 (D.Conn. 1953). See also *Goodall-Sanford, Inc. v. United Textile Workers*, No. 5029, decided today.

## VI.

Plaintiff has submitted a motion to this court, under 28 U.S.C. § 1653, to amend its complaint so as to allege diversity of citizenship between all the members of the Union

and defendant, no doubt as a hedge against a ruling that relief could not be granted under the law applicable to a federal question case. In view of our decision, this motion may have become moot, but it must in any event be denied, for it cannot accomplish the result intended. Rule 17(b) F.R.C.P.; *Donahue v. Kenney*, 327 Mass. 409 (1951); *Worthington Pump & Machinery Corp. v. Local 259*, 63 F. Supp. 411, 413 (D. Mass. 1945).

*The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.*

## APPENDIX C

# United States District Court

## District of Massachusetts

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CIVIL ACTION

No. 54-993-A

LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (UE)

v.

GENERAL ELECTRIC COMPANY

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### OPINION

March 28, 1955

ALDRICH, D.J. This is a motion to strike claims for equitable relief in a suit brought under § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. The relief requested is specific enforcement of the arbitration provisions of a collective bargaining contract. Thus I am asked to review the decision of Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, D.Mass. 113 F.Supp. 137. This is a duty not lightly to be undertaken, but the arguments presented seem sufficiently persuasive to warrant such consideration. Certain implications of *American Thread* have not found uniform acceptance. Of greater importance, so far as I am concerned, the Court of Appeals has since had occasion to pass on one aspect of equitable jurisdiction under § 301(a), *W. L. Mead, Inc. v. International Brotherhood, etc.*, 1 Cir., 217 F.2d 6, affirming my disclaimer of jurisdiction to enjoin a strike in violation of a collective bargaining contract, 125 F.Supp. 331.

In the Mead opinion I cited American Thread as authority for the belief that § 301(a) gives the court some equity powers if the Norris-LaGuardia Act does not interfere. As I read the decision of the Court of Appeals, the now material difference between that court and myself was that it was more cautious than I was with respect to that dictum. And while it did not criticize American Thread, neither could it be said that it gave it even oblique approval.

The substance of the decision of the Court of Appeals in Mead is summarized, at p. 9, in the following two sentences,

"Nowhere in the section [§ 301] is it expressly provided that the terms of the Norris-LaGuardia Act shall not be applicable to suits for violation of collective bargaining agreements; and § 301 contains no provisions necessarily inconsistent with the terms of the earlier Act. . . . It is an accepted canon of construction that repeals by implication are not favored."

The omitted portion of the opinion between these two sentences, and the Mead decision itself, indicates to me that the court felt American Thread could be considered sound only if the injunctive power there recognized was not contrary to the provisions of the Norris-LaGuardia Act, without the benefit of any implied repeal by the Labor Management Act.

The questions, therefore, are, does Norris-LaGuardia forbid injunctions to enforce arbitration agreements, and, if it does not, in the light of Norris-LaGuardia, does § 301(a) by implication confer jurisdiction for such enforcement?

There can be no doubt that the refusal to arbitrate the interpretation and application of a wage rate, and of a discharge, although an alleged breach of a collective bargaining agreement, constitutes a labor dispute. *W. L. Mead v. International Brotherhood*, supra. With certain

specific exceptions Norris-LaGuardia in terms forbids injunctions in all labor disputes. Arbitration is not one of the stated exceptions. At the same time, however, it must be recognized that when Norris-LaGuardia was enacted compulsory arbitration was an unavailable remedy,\* and logically could scarcely be expected to be included in the list of exceptions. It is also to be noted that the act did give affirmative approval of voluntary arbitration. 29 U.S.C. § 108.

American Thread cites several cases on the subject of Norris-LaGuardia. The first is *Milk & Ice Cream Drivers & Dairy Employees v. Gillespie Milk Products Corp.*, 6 Cir., 203 F.2d 650. This per curiam opinion is not persuasive. In the first place it seems to suggest that § 301 gives full injunctive powers. This is contrary to Mead. Beyond that, it relies on *Alco Mfg. Co.*, the second decision cited in American Thread, and discussed infra. American Thread's third edition is *Mountain States Division No. 17 v. Mountain States T. & T. Co.*, D.C.D.Colo., 81 F.Supp. 397, which holds that an action to enforce a collective bargaining agreement does not involve a "labor dispute." In the light of Mead, this is no authority.

The decision in *Textile Workers Union v. Alco Mfg. Co.*, D.C.M.D.N.C., 94 F.Supp. 628, principally relied on by American Thread and Gillespie, is an interesting one. There a union sought a mandatory injunction to compel an employer to recognize an award and reinstate two striking employees. In taking jurisdiction the court made two observations. One was that the requirements of Norris-LaGuardia have been met. The other was that § 104 related

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\*Cf. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, assuming the Federal Arbitration Act did not apply, which no one then thought. *International Union v. Colonial Hardwood Floor Co.*, 4 Cir., 168 F.2d 33; *Mercury Oil Refining Co. v. Oil Workers Int. Union, CIO*, 10 Cir., 187 F.2d 980; but cf. *Hoover Motor Exp. Co. v. Teamsters, Chauffeurs, etc.*, 6 Cir., 217 F.2d 49.

only to injunctions against unions, and not to those sought in their favor.

It is difficult to perceive on the face of the opinion how the requirements of the act had been met. Indeed, in this regard the decision is reminiscent of the type of judicial erosion suffered by the Clayton Act, against which loose interpretation § 101 of Norris-LaGuardia seems expressly designed. The court's second observation is also questionable. Regardless of what may be said about the general purpose clause, § 102, even though Norris-LaGuardia in fact proved to be, and doubtless, was expected to be, of far greater use to unions than to employers, I do not believe it was intended to be a one-way street. On the contrary, in the report of the Senate Judiciary Committee Senator Norris stated quite the opposite.\*

I am forced to conclude that the plain language of Norris-LaGuardia forbids the issuance of an injunction. Under the circumstances reliance on generalizations in the forms of declarations of policy which might lead me to think that Congress would have intended an exception for a situation which it does not appear that it anticipated, had it been visualized, seems to go beyond my powers. Furthermore, Congress had full opportunity to provide that exception itself when it passed the Labor Management Act, if by that act it had a purpose to create injunctive remedies. Having in mind that implied revocations are not favored, I discover nothing in the act, or in its legislative history,\*\* to warrant

\* "It will be observed that this section [106], as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees." Sen. Rep. No. 163, 72d Cong., 1st sess., 19.

\*\* An earlier draft of the Labor Management Act expressly provided that Norris-LaGuardia should be repealed in the case of actions to enforce collective bargaining agreements. §302(e). H.R. 3020. House Rep. No. 245, 80th Cong. 1st sess. 95. This section

a finding that it did so. It becomes unnecessary to review the other aspects of American Thread. The motion to strike the prayer for an injunction is granted for want of jurisdiction. I do not pass on the defendant's remaining motions, since the plaintiff amended its complaint after they were heard. If it wants them considered, they should be remarked.

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was rejected, except for express reservations, as Senator Taft thereafter informed the Senate. Congress. Rec. June 5, 1947, 6603. See, also, Castle and Cooke Terminals v. Local 137, etc., D.Hawaii, 110 F.Supp. 247, 251.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 276

GENERAL ELECTRIC COMPANY,

PETITIONER

vs.

LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (U.E.)

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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In its Brief in Opposition the respondent admits that that "there is concededly an irreconcilable conflict among courts of appeals" (Br. p. 12) on the issues raised by the Petition for Certiorari as to the jurisdiction of a federal court, in an action brought under §301 of the Labor Management Relations Act, to compel arbitration by virtue of the United States Arbitration Act. But it argues that those issues were not really before the Court below for decision and that the Court's

elaborate and detailed consideration of them was "an abstract discussion of law" (Br. p. 13), mere idle talk about "hypothetical, unreal, moot, non-final and abstract questions" which may never arise (Br. p. 15). Accordingly, it contends that the decision should not be reviewed by this Court. There is no substance to this contention.

The question before the District Court, on defendant's motion to strike, was whether it had jurisdiction to compel arbitration. Since it held that the Norris-LaGuardia Act barred the relief sought, the District Court found it unnecessary to consider the further point, argued before it by both parties, whether, even apart from the prohibitions of that Act, it had any power to grant the relief prayed for. On appeal that point, as well as the applicability of the Norris-LaGuardia Act, was squarely presented to the Court of Appeals and, as that Court stated, "was fully briefed and argued" by the parties. Clearly the Court of Appeals was required to pass on all objections to the jurisdiction of the lower court. Its conclusion that the District Court had power to compel arbitration under the United States Arbitration Act was no gratuitous dictum but a decision on an issue necessary to the disposition of the case before it. And on the strength of that decision it similarly disposed of the two companion cases, *Newspaper Guild v. Boston Herald-Traveler Corporation*, 233 F. 2d 102 (1st Cir. 1956) and *Goodall-Sanford, Inc. v. United Textile Workers*, 233 F. 2d 104 (1st Cir. 1956), the latter of which is now pending before this Court on a petition for a writ of certiorari (October Term 1956, No. 262).

It is elementary that certiorari may appropriately be granted to review a decision of a court of appeals

reversing and remanding a case to a district court for further proceedings. See, e.g., *Forsyth v. Hammond*, 166 U. S. 506 (1897); *Spiller v. Atchison, Topeka & Santa Fe Railroad Company*, 253 U. S. 117 (1920); *United States v. Gulf Refining Company*, 268 U. S. 542 (1925); *Gay v. Ruff*, 292 U. S. 25, 30-31 (1934); *United States v. General Motors Corp.*, 323 U. S. 373 (1945); *Land v. Dollar*, 330 U. S. 731 (1947). As in the cited cases, the Court below here, in holding that the Arbitration Act applies and remanding the case for further proceedings under it, has determined issues "fundamental to the future conduct of the case" (*United States v. General Motors Corp.*, 323 U. S. 373, 377 (1945)) which, because of their importance and the irreconcilable conflict among the circuits thereon, merit present review by this Court. The District Court will now be required to follow the summary procedure provided by §§4 and 6 of the Act. Since the petitioner in its answer has already admitted the making of the arbitration agreement (R. 19, 21) and its refusal to arbitrate the grievances in question (R. 20, 21), the only issue before the District Court will be whether the grievances are arbitrable under the contract. Cf. *Goodall-Sanford, Inc. v. United Textile Workers*, 233 F. 2d 104 (1st Cir. 1956).

There is no merit to the respondent's contention that after remand the nature of the case may be so changed as to render moot the issues decided by the Court of Appeals. That Court, to be sure, directed the District Court to permit the parties to amend their pleadings so as to allege compliance with the requisites of the Arbitration Act and defenses afforded by it. But the Act prescribes no requisites other than those set out in §§1 and 2, which the Court of Appeals has already held to have been satisfied in this case. And it affords no

defenses other than that the contract was not made or that there has been no failure, neglect or refusal to perform it (see §4), matters already covered by the petitioner's answer. Thus, no further amendment of either party's pleadings would appear to be necessary to bring the case within the Arbitration Act as interpreted by the Court of Appeals. Indeed, the Court of Appeals itself held in the *Goodall-Sanford* case that where the record "substantially complies with the requisites of the Arbitration Act" the district court could properly proceed under the Act, although neither party had drawn its pleadings with the Act in mind (233 F. 2d 104, 106).

Even if, as the respondent suggests, it were permitted after remand to amend its complaint so as to invoke jurisdiction solely on the basis of diversity of citizenship, the decision of the Court of Appeals would not be rendered moot. The issue as to the applicability of the Arbitration Act to a collective bargaining agreement would be as fully involved in an action based on diversity of citizenship as in an action grounded on §301 of the Labor Management Relations Act, and the decision of the Court of Appeals has settled that point.

The issues decided by the Court of Appeals go to the very substance of the whole case. In view of their manifest importance and the irreconcilable conflict among the circuits thereon, the judgment below is

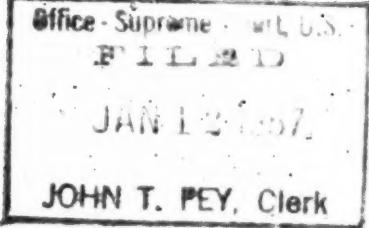
deserving of present review by this Court upon a writ  
of certiorari.

Respectfully submitted,

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**BRIEF FOR THE PETITIONER**

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IN THE  
**Supreme Court of the United States**

October Term, 1956

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No. 276

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**GENERAL ELECTRIC COMPANY,**

PETITIONER

vs.

**LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (U.E.)**

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**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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**BRIEF FOR THE PETITIONER**

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**OPINIONS BELOW**

The opinion of the Court of Appeals (R. 59-82), vacating the judgment of the United States District Court for the District of Massachusetts, is reported in 233 F. 2d 85. The opinion of the District Court (R. 50-53) is reported in 129 F. Supp. 665.

## JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1956 (R. 82). The petition for a writ of certiorari was granted on October 8, 1956 (R. 83). The jurisdiction of this Court rests on 28 U.S.C. §1254.

## STATUTES INVOLVED

The statutes involved are the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §141 *et seq.*; the United States Arbitration Act, 43 Stat. 883, re-enacted 61 Stat. 669, 9 U.S.C. §1 *et seq.*, as amended by Act of September 3, 1954, 68 Stat. 1233; and the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §110 *et seq.* The pertinent provisions of these statutes are set out in the Appendix hereto.

## QUESTIONS PRESENTED

1. Whether, in an action in which jurisdiction is based upon § 301(a) of the Labor Management Relations Act of 1947, a federal district court is authorized by § 4 of the United States Arbitration Act to compel specific performance of an arbitration clause in a collective bargaining contract, despite the Act's limitation to contracts "evidencing a transaction involving commerce" in § 2, and its express exclusion of "contracts of employment" in § 1, and despite the requirement of § 4 that the court must have jurisdiction under Title 28 of the controversy "save for such agreement" to arbitrate.
2. Whether § 301 of the Labor Management Relations Act of 1947 should be interpreted to expand the jurisdiction of the federal courts to entertain actions to compel arbitration under labor contracts notwithstanding

ing that the language of § 301 and its legislative history show that Congress declined to create that new remedy for such contracts.

3. Whether, despite the prohibition of the Norris-LaGuardia Act against any "injunction" in "labor disputes", a federal court has jurisdiction to enforce by injunctive process arbitration of a controversy between a union and an employer concerning terms and conditions of employment in a case where there has been no compliance with the provisions of § 7 of that Act.

### STATEMENT OF THE CASE

Petitioner, General Electric Company (hereinafter referred to as "the Company") is a New York corporation having a manufacturing plant at Ashland, Massachusetts (R. 42). It engages in, and its activities at its Ashland plant affect, interstate commerce (R. 42). The respondent, Local 205, United Electrical, Radio and Machine Workers of America (U.E.) (hereinafter referred to as "the Union") is a voluntary unincorporated labor union with its principal office in Ashland, Massachusetts (R. 42). It has been certified by the National Labor Relations Board, and is recognized by the Company, as the collective bargaining agent for hourly rated production and maintenance workers employed by the Company at its Ashland plant (R. 42).

The Union and the Company entered into an agreement (which was in full force and effect at all times relevant hereto) establishing hours, rates of pay and working conditions for hourly-rated production and maintenance workers at the Company's Ashland plant

(R. 7; Exhibit A to complaint). The agreement provided a four-step procedure for the settlement of employee grievances (Agreement, Art. XII, R. 31). It further provided that "any matter involving the application or interpretation of any provisions of this Agreement", with certain specific exceptions, "may be submitted to arbitration by either the Union or the Company", by written notice given after the decision in the fourth step of the grievance procedure (Agreement, Art. XIII, R. 32).

On April 2, 1954, the Union filed a written grievance that one Boiardi, an employee at the Ashland Plant, was being paid at a lower rate of pay than that specified in his job classification (R. 44), and on August 13, 1954, a written grievance that another employee at the Ashland plant, one Armstrong, had been discharged arbitrarily and not for cause (R. 45). Both these grievances were carried through the fourth step of the grievance procedure, and, not having obtained results satisfactory to it, the Union notified the Company that it was submitting these grievances to arbitration (R. 44, 46). The Company advised the Union of its refusal to arbitrate these grievances (R. 44, 46), taking the position that they were not arbitrable under the terms of the arbitration clause.

Thereupon the Union brought the present action in the United States District Court for the District of Massachusetts, alleging in its amended complaint that the action arose under §§301.(a)-(c) of the Labor Management Relations Act of 1947, and praying that the Company be required to submit the grievances to arbitration and for damages (R. 42-47). The Company moved to strike that portion of the prayer for relief

asking that it be compelled to arbitrate, on the ground that the court had no jurisdiction to grant that remedy (R. 47). The District Court granted the motion (R. 55), holding that the Norris-LaGuardia Act precluded the granting of an injunction to compel arbitration of an alleged breach of a collective bargaining agreement (R. 50-53). The Union then moved to amend its amended complaint so as to eliminate any prayer for damages (R. 55). This motion was allowed, and, since the complaint as thus amended sought only an order directing the Company to arbitrate, the District Court, in accordance with its earlier ruling, entered final judgment dismissing the action for want of jurisdiction (R. 56).

On appeal, the Court of Appeals reversed (R. 82), holding that, although the controversy between the parties involved a "labor dispute" within the meaning of the Norris-LaGuardia Act, nevertheless the provisions of §7 of that Act were not applicable to an action to compel arbitration of grievances under a written contract. The court then proceeded to consider whether there was any basis on which a federal court could order enforcement of the arbitration agreement. On this question it held: (1) that in an action under §301 (a) of the Labor Management Relations Act, the availability of the remedy of specific enforcement of an agreement to arbitrate was to be determined by federal, not state, law; (2) that in the absence of an explicit statutory basis, federal courts could not enforce executory agreements to arbitrate; (3) that no such statutory basis was created by §301 (a) of the Labor Management Relations Act itself; (4) that the United

States Arbitration Act, however, provided an integrated system for compelling arbitration; (5) that the arbitration provision in the collective bargaining agreement in question was "a contract evidencing a transaction involving commerce" within the meaning of §2 of the Act and was not excluded from the operation of the Act by §1 thereof as a "contract of employment" of "workers engaged in foreign or interstate commerce"; and (6) that the remedy of specific enforcement, provided by §4 of the Act, was available. Accordingly it remanded the case of the District Court for further proceedings.

### SUMMARY OF ARGUMENT

I. The United States Arbitration Act does not cover arbitration provisions in a collective agreement between a union and an employer since §1 of the Act expressly excludes "contracts of employment" and since such an agreement is not a contract "evidencing a transaction involving commerce" within the meaning of §2. Consideration of the history of the Act shows that it was intended to cover only *commercial* arbitrations and to leave labor controversies entirely outside its scope. The provision excluding "contracts of employment" was put in §1 to meet the protests of labor unions against enforcement of arbitration by judicial process, and the draftsmen and sponsors of the proposed legislation stated unequivocally that the Act was not designed in any way to cover arbitration of labor disputes. Subsequent proposals for a new act, or for an amendment of the Arbitration Act, to provide for arbitration under labor agreements were never adopted. At the time of its enactment, and for twenty-five years

thereafter, the Arbitration Act was regarded as having no relation to labor and when Congress re-enacted it in 1947 it made no change in its provisions.

The court's conclusion that the term "contracts of employment" refers only to individual contracts of hire, and is not apt language to apply to collective agreements, ignores the history and purpose of the exclusionary clause. The term has been used popularly and in judicial decisions, by this Court as well as others, to describe union agreements.

The Court's further conclusion, that a collective agreement, although not a "contract of employment", is a contract "evidencing a transaction involving commerce", and thus enforceable under § 2, equally ignores the fact that Congress was referring to *commercial* transactions in the Arbitration Act. If the former phrase is not apt language to describe a collective agreement, the latter phrase is certainly far less apt. The court applied a strict standard of verbal accuracy in construing § 1 and a lax standard in interpreting § 2.

The exclusion from § 1 of collective agreements is not limited to transportation workers or those engaged directly in the channels of interstate commerce. The exclusion is as broad as the coverage of § 2. There is no reasonable basis for concluding that Congress intended to distinguish between classes of workers, to include certain collective bargaining agreements within the Act, but not others. As the history of the exclusionary clause clearly establishes, its purpose was to insure that no labor agreements of any sort should be within the Act.

In holding that the arbitration agreement in question, if valid under §§ 1 and 2 of the Act, could be enforced in this action by virtue of the provisions of § 4 of the Act, the Court overlooked the provision of § 4 that only a district court which "save for such agreement" to arbitrate would have jurisdiction under "Title 28" can exercise the powers conferred by that section. In the present action the district court had no jurisdiction, apart from the agreement to arbitrate, over the subject matter of the controversy since neither diversity of citizenship nor a case arising under the laws of the United States is involved.

Congress has repeatedly declined to provide for judicial enforcement of labor arbitration agreements although it has considered the problem on several occasions since 1925. In the face of such Congressional inaction, courts should not resort to a strained statutory construction in order to force arbitration of labor agreements into the mould of an Act designed solely to meet commercial and mercantile needs. Whether labor agreements should be enforced by the courts, and if so, what type of procedural framework should be utilized in labor arbitrations, are matters which properly should be left to legislative consideration.

II. The common law rule which has prevailed in both the federal and state courts was that agreements to arbitrate would not be specifically enforced. Congress on several occasions—and most recently in connection with the Labor Management Relations Act itself—considered, and decided against, proposals which would have provided a procedure for compelling performance of labor arbitration agreements. In view of Congress' repeated refusal to change this long-standing judicial

rule and the clearly expressed intention of Congress that § 301 was not to open the federal courts to remedies not previously available, § 301 cannot be said to have extended the jurisdiction of the federal courts to actions seeking specific enforcement of arbitration agreements. But even if the federal courts would have jurisdiction of such an action, the substantive law applicable to the claim for relief—whether state or federal law applies—bars the relief sought. Furthermore, the union in this case is seeking to vindicate personal rights of the employees involved and is therefore barred by the holding of this Court in *Ass'n of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 43 (1955).

III. Since the instant case arose out of and involved a controversy between the Union and the Company over the terms and conditions of employment of two employees, it constituted a "labor dispute" under the Norris-LaGuardia Act. A federal court, therefore, had no jurisdiction to enforce arbitration by injunctive process except upon the conditions set out in §7 of the Act. Admittedly those conditions were not met in the present case. Although correctly holding that the relief sought was an "injunction" within the meaning of that section, the court below held that the section was not a bar to injunctions against breaches of contract because it applied only to "unilateral coercive conduct", such as involved in strikes and picketing. That ruling ignores the unequivocal language of §7 which, with other sections of the Act, reflects Congress' firm purpose to take the federal courts entirely out of the business of issuing injunctions in the whole field of labor controversies except in the very limited instance of destructive violence defined in §7. It also runs counter

to a long line of decisions which have applied the section in actions by unions and employees, as well as employers, to enjoin breaches of contract and other non-coercive conduct. The practical effect of limiting §7 to injunctions against coercive conduct is to make arbitration agreements specifically enforceable only against employers. Since §4 of the Act absolutely bars any injunction against a strike, a union is always free to strike if it does not choose to arbitrate, or if the arbitrator's award is not to its liking. Moreover, the court's construction of §7 opens up the whole field of collective agreements, except no-strike clauses, to policing by injunctive process. Yet in enacting the Labor-Management Relations Act of 1947, Congress, after consideration, refused to lift the bar of the Norris-LaGuardia Act in actions to enforce collective agreements. The social desirability of empowering courts to enjoin breaches of labor contracts is clearly a matter of policy for the legislature to determine. The decision of the court below not only results in inequity but is at variance with the policy of Congress as expressed in both the Norris-LaGuardia and Labor-Management Relations Acts.

## ARGUMENT

### I.

#### **THE RESPONDENT IS NOT ENTITLED TO RELIEF ON THE BASIS OF THE UNITED STATES ARBITRATION ACT.**

- A. *Arbitration Provisions in Collective Bargaining Contracts Do Not Come Within the Terms of §§ 1 and 2 of the United States Arbitration Act.*

The court below held that the provision for arbitration contained in the Agreement between the Union and

the Company was in a contract "evidencing a transaction involving commerce" within the meaning of § 2 of the Arbitration Act, and that it was not excluded from the Act as a "contract of employment" or "workers engaged in foreign or interstate commerce" within the meaning of § 1.

As to the first point, it is difficult to determine the basis for the court's conclusion. The court conceded it was "not usual" to refer to a labor contract as "evidencing a transaction" (R. 75), and that the contract did not consummate the employment relationship, which, it might be argued, constituted a "transaction" (R. 75). Nevertheless it held that the agreement in question was within § 2 because it clearly "involved commerce" (R. 76), apparently regardless of whether or not it "evidenced a transaction".

On the second point, the court's holding is, with a single exception, contrary to the position taken by the Court of Appeals of every circuit which has faced the problem.<sup>1</sup> Although conceding that the words "contract of employment" did not have a "plain meaning"

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<sup>1</sup>*Signal-Stat Corporation v. Local 475, United Electrical, Radio & Machine Workers*, 235 F. 2d 298 (2d Cir. 1956); see *Shirley-Herman Co. v. International Hod Carriers, etc., Union*, 182 F. 2d. 806, 809, (2d Cir. 1950); *Amalgamated Ass'n v. Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (3d Cir. 1951); *Pennsylvania Greyhound Lines, Inc. v. Amalgamated Ass'n*, 193 F. 2d 327 (3d Cir. 1952); *United Electrical, Radio & Machine Workers v. Miller Metal Products, Inc.*, 215 F. 2d 221 (4th Cir. 1954); *United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F. 2d 33 (4th Cir. 1948); *Lincoln Mills of Alabama v. Textile Workers Union*, 230 F. 2d 81 (5th Cir. 1956); see *Mercury Oil Co. v. Oil Workers Int'l Union*, 187 F. 2d 980, 983 (10th Cir. 1951); contra: *Hoover Motor Express Co. v. Teamsters, Chauffeurs, etc., Local 327*, 217 F. 2d 49 (6th Cir. 1954); *Local 19, Warehouse etc. Workers Union v. Puck-eye Cotton Oil Co.*, 236 F. 2d 776. (6th Cir. 1956).

(R. 77) or a "fixed technical definition" (R. 76), it concluded that since they were more familiar today (whatever they may have been in 1925) as the equivalent of an individual "contract of hire", they should not be interpreted as embracing union-negotiated collective agreements. Brushing aside legislative history, the court felt free to hold that collective agreements were covered by the Act.

Since, as the court noted, the language of §§ 1 and 2 is, at best, "not usual terminology" (R. 75) and somewhat "enigmatic" (R. 76), it is peculiarly appropriate, in determining the meaning of the Act, to consider it in its historical setting and with reference to its legislative history. See, e.g., *United States v. American Trucking Associations*, 310 U.S. 534, 543-544 (1940); *United States v. Public Utilities Commission*, 345 U.S. 295, 315-316 (1953); *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932). So considered, there can be no doubt that it was intended to be confined to commercial arbitrations and to leave controversies arising under collective agreements entirely outside its scope. The court below, we submit, either misconceived, or was not fully aware of, the history—which clearly evidences a purpose to exclude all labor contracts and disputes from the Act.

The advocates of the Arbitration Act were concerned with overturning the rule, "long embedded in the decisions of the federal, as well as state and English courts" (R. 72), which denied specific enforcement of agreements to submit to arbitration. The Act was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar As-

sociation,<sup>2</sup> acting upon instructions from the Association to consider and report upon "the further extension of the principle of commercial arbitration". 45 A.B.A. REP. 75 (1920)<sup>3</sup> In December 1922, the committee's draft of the federal act was simultaneously introduced as a bill in the Senate (S. 4214) and in the House (H.R. 13522). 64 CONG. REC. 732, 797 (1922)

As it then stood, § 2 of the bill made valid and enforceable written "provisions for arbitration" in "any contract or maritime transaction or transaction involving commerce", and § 1 contained no exclusionary language. The bill, in this form, came to the attention of Andrew Furuseth, President of the International Seamen's Union of America, who strongly objected to it as a "compulsory labor" bill and submitted the specific grounds for his disapproval in a lengthy analysis to his Union at its twenty-sixth annual convention. *Proceedings of the 26th Annual Convention of the International Seamen's Union of America* 203 (1923). His opposition rested upon its possible effect not only on arbitration clauses in seamen's individual contracts of hire, but also on the arbitration clauses which were already prevalent in that industry's

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<sup>2</sup>A detailed history of the American Bar Association's efforts in this regard, not repeated here, is set forth at 50 A.B.A. REP. 356-362 (1925).

<sup>3</sup>The Committee also drafted a proposed uniform state act (46 A.B.A. REP. 355 (1921)), and a form of treaty "for the purpose of making effective international commercial arbitration agreements" (47 A.B.A. REP. 294 (1922)), the adoption of which, in conjunction with the proposed federal act, would, in the Committee's view, "enable businessmen to settle their disputes expeditiously and economically". *Id.* at 295

union-management collective agreements.\* In his analysis of the bill, after discussing its effect upon individual contracts of hire, he went on:

"So far we have dealt with the individual. What about those who shall seek to protect themselves through mutual aid? Some organizations are very strong in their cohesiveness. Cannot those organizations save not only the individuals but themselves?

"The Supreme Court has decided that voluntary organizations may be sued. If they shall enter into an agreement containing an arbitration clause, there can be little doubt that the organization will be bound." *Id.* at 204.<sup>5</sup>

Protests against the bill were also made by the American Federation of Labor. *See Proceedings of the 45th Annual Convention of the American Federation of Labor* 52 (1925). Representatives of the Federation later explained that the basis for labor's fear of the bill was the danger of powerful interests compelling weaker interests to submit to terms of arbitration by which decisions would be practically under the control of the more powerful parties. *See* 53 A.B.A. REP. 351-352 (1928).

<sup>4</sup>Three of the International Union's largest District Unions had collective agreements containing arbitration clauses—*i.e.*, the agreements of the Eastern Gulf Sailors' Association, the Marine Firemen's, Oilers' and Watertenders' Union of the Atlantic and Gulf, and the Marine Cooks' and Stewards' Association of the Atlantic and Gulf. *Proceedings of the 24th Annual Convention of the International Seamen's Union of America*, 186, 190, 191 (1921).

<sup>5</sup>In the course of the discussion of Furuseth's analysis, other speakers at the convention opposed the bill. See, *e.g.*, the remarks of Mr. Flynn, Chairman of the Committee on Resolutions. *Proceedings of the 26th Annual Convention of the International Seamen's Union of America* 83-84 (1923).

At that time, unions in many trades and industries, in addition to the seamen, had collective agreements containing arbitration clauses.<sup>6</sup> Under the existing law, however, such arbitration machinery could not be enforced against them. The very recent experience of unions in 1920, 1921 and 1922 in the coal mining, building trades and other fields, with adverse arbitration awards leading to strikes, doubtless tended to diminish labor faith in voluntary arbitration. See WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 35-36 (1952). At the same time, unions were fighting against various proposals and instances of compulsory arbitration, such as that embodied in the Kansas Industrial Relations Court Act of 1920. *Id.* at 39-43. Under such circumstances, it is not surprising that labor was opposed to accepting the entirely radical notion of enforcement of arbitration clauses by judicial process. Moreover, the period was one of growing labor distrust and hostility toward the equitable powers of the federal courts, stemming from the extensive use of federal injunctions in strikes, federal decisions cutting down the protection of §20 of the Clayton Act, and court enforcement of "yellow dog" contracts. The attitude of labor was well summarized in an article by a spokesman for the American Federation of Labor (19 *American Federation of Labor Weekly News Service*, No. 5 (1929)) in stating: "If equity courts are empowered to enforce arbitration awards, the bars are thrown down for judge-controlled

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<sup>6</sup>Such provisions were prevalent, for example, in the collective agreements of the garment workers, electrical workers, machinists and mine workers, teamsters, and boot and shoe workers. See 53 A.B.A. REP. 359 (1928); MILLIS AND MONTGOMERY, ORGANIZED LABOR 708-713 (1st ed. 1945); WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 23-26 (1952); Oliver, *The Arbitration of Labor Disputes*, 83 U. OF PA. L. REV. 206, 213-214 (1934).

unions". A federal act, making arbitration agreements enforceable in equity in the federal courts, was certain to encounter strong labor opposition at that time. In *Amalgamated Association v. Pennsylvania Greyhound Lines*, 192 F. 2d 310, 313 (3d Cir. 1951), the Court noted the "Widespread dissatisfaction with compulsion from the federal bench in labor disputes during the era in which the statute was passed"; and went on to say: "For Congress to have included in the Arbitration Act judicial intervention in the arbitration of disputes about collective bargaining . . . would have created pointless friction in an already sensitive area. . . ."

Accordingly, at the hearing on the proposed Arbitration Act before the Senate subcommittee to which the bill had been referred, Mr. Piatt, Chairman of the American Bar Association's Committee on Commerce, Trade and Commercial Law, after referring to the objections of the Seamen's Union, took pains to make it clear that "It was not the intention of this bill to make an industrial arbitration *in any sense*", and added:

" . . . and so I suggest that in as far as the committee is concerned, if your honourable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce'. *It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.' Hearing before a Subcommittee of the Com-

*mittee on the Judiciary on S. 4213 and S. 4214, 67th Cong., 4th Sess. 9 (1923).* (emphasis supplied)

In the course of the hearing, Senator Sterling, the subcommittee Chairman, referred to the exclusionary clause proposed by Mr. Piatt as

“... your suggested amendment in regard to *the labor associations*; that they shall not be considered.”  
*Id.* at 10 (emphasis supplied).<sup>7</sup>

In December 1923, at the next session of Congress, the bill was reintroduced in both the House and Senate, but this time the first section of the bill contained the exclusionary language which had been proposed at the subcommittee hearing, and which presently appears in § 1 of the Act; and, in the definition of “maritime transaction” in § 1, the words “seamen’s wages”, which had originally been included, were deleted. *Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646* (68th Cong., 1st Sess.) 2 (1924). The subject matter of the committee hearing on the bills was described as “Arbitration of Interstate Commercial Disputes” (*Id.* at 1), and page after page of the printed record of this hearing reflects the commercial nature of the bill. Over seventy commercial organizations—trade associations, chambers of commerce and bankers’ associations—which had endorsed the bill were represented at the

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<sup>7</sup>See also the letter by Secretary of Commerce Hoover to Senator Sterling, Chairman of the Senate subcommittee, dated January 31, 1923, the day of the hearing. **HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY ON S. 4213 AND S. 4214, 67th Cong., 4th Sess. 14 (1923).** Hoover called attention to “The urgent need of a Federal commercial arbitration act”, and, in an effort to speed the passage of the bill and eliminate objection in the broad field of “workers’ contracts”, he suggested amending the Act by insertion of the present exclusionary language of § 1.

hearing. But not a single labor union appeared, nor was there any testimony or suggestion by anyone that the bill was intended in any way to apply to union agreements. Both the House and Senate reports on the bill are equally devoid of any indication that arbitration of labor disputes was in any way to be included. H.R. REP. No. 96, 68th Cong., 1st Sess. (1924); SEN. REP. No. 536, 68th Cong., 1st Sess. (1924). Indeed, the Senate Committee, by amendment, narrowed the provision of § 2 by substituting for the broader provision "*any contract or maritime transaction or transaction involving commerce*" the present phrase "*maritime transaction or contract evidencing a transaction involving commerce*".

On the floor of Congress, the sponsors of the legislation similarly pointed to the bill's commercial character. Thus, Congressman Graham, Chairman of the House Committee on the Judiciary, stated:

"This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement *in commercial contracts and admiralty contracts*—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.

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It creates no new legislation; grants no new rights, except a remedy to enforce an agreement *in commercial contracts and in admiralty contracts*." 65 CONG. REC. 1931 (1924). (emphasis supplied)

And later, Congressmen Mills of New York, who had introduced the bill in the House, in response to a request for an explanation of its provisions, said:

"This bill provides that where there are *commercial contracts* and there is disagreement under the contract, the court can force an arbitration agreement in

the same way as other portions of the contract." 65 CONG. REC. 11080 (1924) (emphasis supplied).

The very year after the enactment of the Arbitration Act, Congress provided in the Railway Labor Act for voluntary submission of disputes to arbitration. 44 STAT. 577 (1926). There it carefully set up the machinery and procedure for submission, but expressly provided that failure to arbitrate shall not be "a violation of any legal obligation". 44 STAT. (1926), 45 U.S.C. § 157 (1946). If collective agreements covering railway workers were already within the scope of the Arbitration Act, the emphasis in the Railway Labor Act upon the complete freedom to submit to, or to reject, arbitration seems anomalous.

As enacted, the Arbitration Act, with the exclusionary language in §1, was generally considered by the business, legal and labor interests who had been most concerned with it as not in any way relating to labor or covering union contracts. Thus, in 1925, the executive council of the A.F. of L., in referring to the Act in its annual report, stated:

"Protests from the American Federation of Labor and the International Seamen's Union brought about an amendment which provides that 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' This exempts labor from the provisions of the law, although its sponsors denied that there was any intention to include labor disputes." *Proceedings of the 45th Annual Convention of the American Federation of Labor* 52 (1925)<sup>8</sup>

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<sup>8</sup>The report of the A.F. of L.'s Committee on Legislation commended the executive council "for having clarified this legislation in the manner stated" and recommended that the "judicial interpretation" of this law be observed "in order that its intent shall not be misconstrued to the disadvantage of labor." *Id.* at 172.

Moreover, in 1926, one year after the Act's passage, the American Bar Association's Committee on Commerce, Trade and Commercial Law, which had drafted and sponsored the Act, began work upon a new bill which would apply in the labor field. Noting that "Congress has already enacted a statute providing a method for the settlement of commercial disputes by means of arbitration", the Committee stated that it was "convinced that a similar statute may properly be enacted by Congress providing for the settlement in like manner of industrial disputes . . ." 51 A.B.A. REP. 394 (1926). After two years, during which the Committee held public hearings and conferred extensively with representatives of business, of labor and of governmental agencies, it submitted a draft of a bill, to make enforceable written agreements made "by an employer or organization of employers with an organization of employees" to submit to arbitration disputes "concerning terms of employment or conditions of labor". 53 A.B.A. REP. 376 (1928). Pointing out that labor opposition, which had led to the exclusionary language in the Arbitration Act, had prevented "application of the law generally to agreements to arbitrate industrial controversy as well as commercial controversy" (*Id.* at 351), the Committee stressed the necessity of taking into account this "state of mind on the part of the workers of the country" in any effort to frame a statute dealing with "arbitration of industrial disputes." *Id.* at 352. The Committee's proposal for labor arbitration was not acceptable to labor, to whom it smacked of injunctions, and in 1929 President Green of the American Federation of Labor denounced the measure. 19 *American Federation*

*of Labor Weekly News Service*, No. 5. (April 13, 1929).<sup>9</sup> Accordingly, the Committee concluded, in 1930, that "public opinion is not yet ready for this legislation" and that "it would be a mistake to press it actively at the present time". (55 A.B.A. REP. 328 (1930)).

In 1942, a proposal was again made for legislation to provide judicial enforcement of arbitration clauses in collective agreements. Again the proposal was not adopted. A bill, drafted by Professor Sturges, Chairman of the American Arbitration Association's law committee, to amend the Arbitration Act was introduced in the Senate (S. 2350, 77th Cong., 2d Sess.). 88 CONG. REC. 2071. Among other things, the bill struck out the exclusionary language of § 1 of the Act and contained a new § 2A expressly covering the enforcement of arbitration agreements between labor organizations,

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<sup>9</sup>This article in the Federation's *Weekly News Service* entitled "A.F. of L. Executive Dodges Lawyers' Injunctions Trap", attacked in very strong terms the proposal to provide for enforcement of arbitration by equity courts. In part, the article stated:

"The lawyers' proposal appears innocent, but it cannot stand analysis. To say that a wage arbitration award is identical to arbitration of an interpretation of a contract between two businessmen is to revive the discarded theory that labor is a commodity.

"Arbitrators have been known to wander far afield in their decisions, and it is not too much to say that this inclination would be strengthened if courts were empowered to enforce the award and this type of arbitrator knew workers were helpless.

"When an equity court is given jurisdiction the worker is helpless. The court is ruled by his conscience. He has a free hand to exploit his prejudices and his economic views.

"The lawyers' proposal will be dressed up in a garb that is pleasing to the eye, but behind the scenes loom equity judges who await a legislative order that will enlarge their jurisdiction over workers."

or representatives of employees, and employers. In an explanatory statement accompanying the bill, it was stated that the purpose of the proposed amendment was "extension of the act to embrace written agreements to arbitrate labor controversies" (88 CONG. REC. 2072).<sup>10</sup> The bill, however, was never reported by the Committee.

Thus, at the time of the enactment of the Arbitration Act, and for years afterwards, it was well understood that collective bargaining agreements were excluded from its operation. When in 1947 Congress re-enacted the Act, without change, into positive law, as Title 9 of the United States Code,<sup>11</sup> the only existing judicial construction of § 1 of the Act was in accord with this long-continued understanding that the Act did not apply to union agreements. *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (6th Cir. 1944). Indeed, not until 1950, did any court hold that the Act did not really mean what everyone for twenty-five years had supposed that it did mean. *United Office Workers v. Monumental Life Ins. Co.*, 88 F. Supp. 602 (E.D. Pa. 1950).

Despite this history, which makes it evident that Congress intended to exclude union agreements from the Act, the court below reached a contrary conclusion. The language of the Act does not compel any such re-

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<sup>10</sup>The statement continued:

"Just as the present act was designed to overcome the common-law rules of 'revocability' and 'nonenforceability' of written agreements to arbitrate commercial controversies arising between the parties, so by section 2A, as proposed, would the act be extended to written agreements to arbitrate labor controversies."

<sup>11</sup>In reporting the Bill, the House Committee on the Judiciary said: "No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill." H.R. REP. No. 255 on H.R. 2084, 80th Cong., 1st Sess. (1947).

sult. Indeed, the court conceded that the words "contract of employment" in § 1, "do not have a 'plain meaning'" (R. 77) and are not a term of art with "a fixed technical definition" (R. 76). Nevertheless, it held that the words are not "apt language" to exclude collective agreements. From the standpoint of modern labor terminology, it may be that the phrase "contract of employment" is today more familiar as the equivalent of an individual contract of hire than of a union collective agreement (R. 76). But the term has not infrequently been used by courts and others in reference to what we now refer to as "collective bargaining contracts". Such union contracts have, for example, been variously described as "contracts of employment", *Goyette v. C. V. Watson Co.*, 245 Mass. 577, 587, 140 N.E. 285, 288 (1923), "employment contracts"; *Florestano v. Northern Pacific Ry.*, 198 Minn. 203, 206, 269 N.W. 407, 408, (1936); 63 C.J. 672-673), and "working agreements", *O'Keefe v. Local 463, United Ass'n of Plumbers and Gas Fitters*, 277 N.Y. 300, 302, 14 N.E. 2d 77 (1938). Even as late as 1939, this Court, in the course of discussing the purposes of the National Labor Relations Act, referred to collective bargaining contracts as "employment contracts":

"The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employes to the end that *employment contracts* binding on both parties should be made." *N.L.R.B. v. Sands Manufacturing Co.*, 306 U.S. 332, 342 (1939) (emphasis supplied).

And that characterization of collective bargaining agreements as "employment contracts" was quoted in full in the Senate Committee report on the Labor

Management Relations Act. (SEN. REP. No. 105, 80th Cong., 1st Sess. 15 (1947)).

The foregoing demonstrates the accuracy of the Third Circuit's comment with respect to the phrase "contracts of employment" that: "Its adoption to comprehend collective bargaining agreements is not less familiar in judicial usage than in general parlance". *Amalgamated Association v. Pennsylvania Greyhound Lines*, 192 F.2d 310, 313 (3d Cir. 1951). It likewise supports the view so recently expressed in this Court, where, after noting the varying theories as to the legal relations created by a collective contract, it was said that "Evidence is wholly wanting that Congress was aware of the diverse views taken of the collective bargaining agreement . . ." *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 456 (1955). There is simply no basis upon which one can attribute to Congress in 1924 the intention to draw the careful distinction between "contracts of employment" and "collective bargaining agreements" which this Court itself felt it important to explain twenty years later in *J. I. Case v. NLRB*, 321 U.S. 332 (1944).

Moreover, the technical interpretation of the exclusion clause adopted by the court below strips it of much practical significance. The Act's coverage is limited by § 2 to *written* arbitration provisions. Yet such written provisions were in 1925, and are now, usually found in collective agreements, not in individual contracts of hire—for usually only a union has the bargaining power to secure them. Then, as now, little was involved in the individual contract of hire "except the act of hiring". *J. I. Case Co. v. NLRB*, *supra* at 335.

In striking contrast to the court's narrow construction of the words "contracts of employment" in § 1 is its treatment of the term "contract evidencing a transaction involving commerce" in § 2. If, as the court states, the former phrase is not apt language to describe a collective agreement (R. 74), then the latter phrase is certainly far less apt. Indeed, the court conceded that the latter phrase is "not usual terminology" (R. 75) to describe an agreement between a union and an employer establishing hours, rates of pay and working conditions. But, in this instance, it decided to apply a more lax standard of verbal accuracy and expanded § 2 to cover such agreements.

In so doing it ignored the fact that the sponsors of the Act and Congress were thinking exclusively of *commercial* "transactions"—"The farmer who sells his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance." JOINT HEARINGS BEFORE THE SUBCOMMITTEES OF THE COMMITTEES ON THE JUDICIARY ON S. 1005 AND H.R. 646, 68th Cong., 1st Sess. 7 (1924). As we have shown, in the Act as originally drawn § 2 applied to arbitration provisions, not only in any "maritime transaction" and "transaction involving commerce," but also in any "co[n]tract . . . involving commerce". Accordingly, the bill was susceptible of the interpretation that it applied, in terms, not only to commercial transactions but to any type of contract, including labor contracts, as well. Union opposition led to the insertion of the exclusionary language in § 1. The additional change in § 2 of the phrase "co[n]tract . . . involving commerce" to "contract evidencing a trans-

saction involving commerce" further emphasized the exclusively commercial and mercantile character of the situations to which the Act was intended to apply. A collective bargaining contract—if it "evidences a transaction" at all—does not evidence the type of "transaction" to which Congress had reference.

Apparently the Court below felt that the decision of this Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) compelled the conclusion that such an agreement did "evidence a transaction" (R. 75). Such an interpretation of the *Bernhardt* case is not justified. This Court did not pass on the question whether the employment contract there in question "evidenced a transaction" since there was no showing that it "involved commerce". Moreover, as the court below itself noted (R. 75), in that case the individual employment contract did "consummate the employment relationship" or act of hiring, which might be considered a "transaction", whereas the collective agreement here does not even "evidence" that type of "transaction".

It may be urged by the respondent that even if the agreement here in question is a "contract of employment" within the meaning of § 1 of the Act, it does not relate to "workers engaged in foreign or interstate commerce", since the latter phrase applies solely to transportation workers. Such was the novel view adopted in *Fenney Engineering Inc. v. United Electrical Radio & Machine Workers*, 207 F. 2d 450 (3d Cir. 1953) and *Signal-Stat Corporation v. United Electrical, Radio & Machine Workers*, 235 F. 2d 298 (2d Cir. 1956). The rationale of those cases was that since the exclusionary

language of § 1 specifies two classes of workers in the transportation field--i.e. "seamen" and "railroad employees"--the additional phrase "any other class of workers" was intended to mean any other class of *transportation* workers, and that this interpretation is supported by the words "in commerce"--as opposed to such terms as "affecting commerce" or "engaged in the production of goods for commerce".<sup>12</sup> So interpreted, the Act would confine the exclusion to collective contracts of those "acting directly in the channels of commerce itself". *Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers, supra*, at 453.

Such a construction is clearly unwarranted. It means that Congress included certain collective agreements in the Act but not others. That view is contrary to the history of the Act and to common sense. There is not a single indication that either the draftsmen or sponsors of the Act or Congress itself intended to make nice distinctions between various classes of workers. On the contrary, as we have shown, the exclusionary language was inserted in response to union objections and was designed to eliminate the Act's application to *any* type of labor dispute. There is no reason to believe, and nothing to show, that Congress intended the exclusionary clause in § 1 to have a coverage less extensive than that of § 2. *United Electrical, Radio & Machine Workers v. Miller Metal Products, Inc.*, 215 F. 2d 221, 224

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<sup>12</sup>This phraseology may be a term of art today, but there is no basis for contending that it was such in 1925, long before the precise distinctions between "affecting commerce," "in commerce," and "engaged in the production of goods for commerce" were introduced by this Court. Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 597-8 (1954).

(4th Cir. 1954). The suggestion that the reason for the exclusion of collective agreements of transportation workers is to be found in the fact that they were already covered by statutory provisions for arbitration (see *Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers*, *Supra*, at 452) is insupportable. No statutory provisions relating to arbitration had been enacted covering the transportation industries which the *Tenney* case held to be embraced in the phrase "any other class of workers".<sup>13</sup> And the then existing statutory provisions for "railroad workers" had no application to enforcement of arbitration clauses of collective bargaining agreements.<sup>14</sup>

It has been urged by some that even a strained construction of the Arbitration Act is warranted to accomplish a result in furtherance of what is assumed to be a widely accepted policy in favor of judicial enforcement of arbitration in labor disputes. So far as Congress is concerned, it has never expressed such a policy. It did not do so in enacting the Arbitration Act, or the Rail-

<sup>13</sup>As one commentator points out, "[t]here was no risk of duplication" as to "truckers, many maintenance groups, employees engaged in ordering and paying for interstate shipments, warehouse employees where the interstate transit has not ended, etc." Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 599-600 (1954).

<sup>14</sup>The Newlands Act of 1913 applied only to a voluntary submission to arbitration of an existing dispute. 38 STAT. 103-108 (1913). The Transportation Act of 1920 authorized "Adjustment Boards" and a "Railroad Labor Board," but was not directed toward the enforcement of arbitration provisions in collective bargaining contracts. 41 STAT. 469 (1920). Even the Railway Labor Act of 1926, as amended and in force today (44 STAT. 577, as amended, 45 U.S.C. § 151 *et seq.*), does not provide for enforcement of arbitration clauses in collective agreements covering railroad workers.

way Labor Act, or, as we show (2A, below) in much later statutes. On the contrary, whenever faced squarely with the problem of enforcement of arbitration in the labor field, Congress has never seen fit to provide for it. Nor is there, as some assume, universal acceptance of the notion that in the labor field judicial enforcement of arbitration agreements is necessarily good. Many experienced in that field have expressed the contrary view.<sup>15</sup> And state legislatures have divided on the question.<sup>16</sup>

<sup>15</sup> Witness the remarks of Professor Shulman, permanent arbitrator under the Ford Motor Company - United Automobile Workers collective agreement:

"... if the collective agreement provides for resort to voluntary arbitration, it is argued that the law should enforce the agreement; and provision is made for suits to enjoin or compel the arbitration or to enjoin or enforce the resulting awards . . . In my judgment, these are unwise limitations on the parties' autonomy." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1001-1002 (1955).

There is basis for believing that not all sectors of organized labor are in favor of statutory provisions for the *judicial enforcement* of arbitration agreements. For example, in 1940 the A.F. of L. opposed an amendment to the New York arbitration statute which was designed to make labor-management arbitration agreements judicially enforceable; and in 1949 the Illinois Federation of Labor was responsible in large measure for the defeat of a similar proposal before the Illinois legislature. Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. OF CHI. L. REV. 233, 246 (1950).

<sup>16</sup> Some state statutes, for example, expressly excluded arbitration provisions in labor contracts. See e.g. OHIO, GEN. CODE ANN. §12148-1 (1938); NEW HAMPSHIRE, REV. LAWS, c. 415 §1, p. 1724 (1941); WIS. STAT. 298.01 (1949); RHODE ISLAND, GEN. LAWS c. 475 §1 (1938); CALIFORNIA, CODE OF CIVIL PROCEDURE §1280 (1941); OREGON, COMP. LAWS ANN. §§11-601 (1940); PENNSYLVANIA, 5 PA. STAT. ANN. 161 (1930); LOUISIANA, REV. STAT. §9: 4216 (1950); others specifically included them. See e.g., NEW YORK, CIV. PRAC. ACT, Art. 84, Sec. 1448; still others were silent on the matter. See e.g., CONNECTICUT, Gen. STAT. §8151 *et seq.* (1949); NEW JERSEY, STAT. ANN. §2:40 (1939) HAWAII, REV. LAWS c. 165 §8701 *et seq.* (1945).

But beyond the basic policy question, whether judicial enforcement of labor arbitration is socially desirable, there are serious questions as to the soundness of forcing labor arbitration into a statutory scheme expressly designed for *commercial* needs. As the court below observed: "The comprehensive and consistent scheme that legislative action could afford" is a prerequisite to "effective" and "safeguard" arbitration (R. 73). Whether the United States Arbitration Act, which may effectively meet the requirements of commercial arbitration, is an appropriate and comprehensive vehicle for dealing with labor disputes, raises problems of policy and procedure meriting legislative consideration.

If Congress should determine that judicial enforcement of arbitration clauses in collective contracts is advisable, it might well decide that certain legalistic features of the United States Arbitration Act—such as the subpoena power, depositions, cross-examination, etc.—are inappropriate to the purposes of a labor arbitration.<sup>17</sup> It might explore the feasibility of the Act's present provision for the appointment of an arbitrator by the court, where the parties have not provided a method of selection, a provision which some believe "runs counter to prevailing labor-management prejudices concerning arbitration." (Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. OF CHI. L. REV. 233, 265 (1950)); or even conclude that the National Labor Relations Board, not a federal

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<sup>17</sup>This criticism has been directed at the recently proposed Uniform Arbitration Act, and is applicable to the present federal Act as well. See Syme, *Voluntary Labor Arbitration Is Threatened*, 7 Labor Law J. 142 (1956). The author also states:

"It is a total misconception of labor arbitration to have it coupled with commercial arbitration. The two are similar in name, but there the similarity ends."

court, is the appropriate tribunal for the enforcement of labor arbitration agreements. Gregory and Orlikoff, *supra* at 267. It might provide for the enforcement of agreements to arbitrate the terms of a future collective agreement (see *Boston Printing Pressmen's Union v. Potter Press Co.*, 141 F. Supp. 553 (D. Mass. 1956); cf. §2A of the 1942 American Arbitration Association bill, 88 CONG. REC. 2073 (1942)); or treat with the problem of enforcing an arbitration agreement where the union has simultaneously called a strike (see R. 68); or determine the extent to which the federal statute should pre-empt the field (see §1 of the 1942 American Arbitration Association bill, 88 CONG. REC. 2073 (1942)); or spell out the rights and obligations of individual union members with respect to the arbitration agreement and the award (Gregory and Orlikoff, *supra* at 265); or provide for the enforcement of arbitration agreements between unions themselves—another suggestion of the American Arbitration Association's 1942 bill. 88 CONG. REC. 2072 (1942).

These, and other considerations, could be weighed if solution of the problem of enforcement of labor arbitration is left to the legislature—where it belongs. They are entirely outside the range of courts. The cause of good labor-management relations, we submit, is not served in the long run by judicial attempts to enforce labor arbitration by straining an old statute, devised for commercial purposes, to fit what a court thinks ought to be current legislative policy.

**B. By Virtue of § 4 of the Arbitration Act, A Federal Court Has No Power to Direct Arbitration of Individual Employee Grievances In An Action Based On § 301 of the Labor Management Relations Act.**

Even if it be assumed that the agreement to arbitrate here in question was a valid and enforceable contract under §§ 1 and 2 of the Act, the court below was wrong in holding that the district court had power in the present action to compel arbitration under § 4. That section, and the following sections, provide the machinery by which the type of arbitration contracts defined in §§ 1 and 2 may be enforced. § 4 authorizes the issuance of orders directing arbitration under a written agreement by "any United States district court which, *save for such agreement, would have jurisdiction under Title 28*, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties". (Emphasis supplied).

Under this section a district court may compel arbitration only if it would have had jurisdiction under Title 28 *had there been no agreement to arbitrate*. The court's jurisdiction must be tested, therefore, just as if no arbitration agreement had existed.

Both § 4 and § 8 of the Act make it certain that it is the underlying controversy, rather than the refusal to arbitrate itself, which provides the jurisdictional test. § 4 itself refers to the method for hearing "if the *matter in dispute* is within the admiralty jurisdiction". And § 8, in stating that "*If the basis of jurisdiction* be a cause of action otherwise justifiable in admiralty . . .", likewise makes clear that jurisdiction cannot be based

on the controversy arising from the refusal to arbitrate. Thus, throughout the statute, it is the underlying controversy between the parties which either provides, or fails to provide, the basis for federal jurisdiction.

In the present case, the subject matter of the controversy between the union and the company was whether the employee Boiardi had been paid at the proper rate and whether the employee Armstrong had been improperly discharged. The question, therefore, is whether the district court had jurisdiction over those disputes, under Title 28.

In holding that the requirements of § 4 of the Act were satisfied, the court below completely overlooked the requirement that the district court's jurisdiction must be founded on Title 28. Unless the complaint affirmatively establishes the facts necessary to create jurisdiction on one of the grounds enumerated in Title 28, a federal court has no power to order arbitration under § 4. *Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees v. Southern Bus Lines, Inc.*, 189 F. 2d 219 (5th Cir. 1951); *Textile Workers Union v. Williamsport Textile Corp.*, 136 F. Supp. 407 (M.D. Pa. 1955); see *Mengel Co. v. Nashville Paper Products & Specialty Workers Union*, 221 F. 2d 644, 648 (6th Cir. 1955); *Krauss Bros. Lumber Co. v. Louis Bassett & Sons, Inc.*, 62 F. 2d 1004, 1006 (2d Cir. 1933); *San Carlo Opera Co. v. Conley*, 72 F. Supp. 825, 828 (S.D.N.Y. 1946), *aff'd* 163 F. 2d 310 (2d. Cir. 1947).

Although Congress provided in § 301(a) of the Labor Management Relations Act that actions for breach of collective agreements may be brought in the federal courts without regard to diversity of citizenship or

amount in controversy, it did not see fit to extend the provisions of § 4 of the Arbitration Act to such actions. The same Congress which enacted the Labor Management Relations Act, codified and reenacted the Arbitration Act without changing the then existing requirement that to exercise the powers under § 4 a district court must have jurisdiction "under the judicial code at law, in equity or in admiralty" (61 Stat. 669, 9 U.S.C. §4). And when seven years later, in 1954, Congress amended § 4 to bring its phraseology into conformity with present terms and practice, by deleting the reference to the "judicial code" and to "law" and "equity", it substituted the phrase "Title 28".

In the instant case the requisites for jurisdiction under Title 28 are not present. Indeed, the sole basis upon which federal jurisdiction was invoked in plaintiff's amended complaint was § 301 of the Labor Management Relations Act (R. 42). The union's belated attempt to amend its complaint in the Court of Appeals so as to claim jurisdiction also under §1332 (a)(1) of Title 28, on the ground of diversity of citizenship (R. 57), was denied by that court because the motion "cannot accomplish the result intended" (R. 82).<sup>18</sup> Hence the district court had no jurisdiction over the controversy on the grounds of diversity.

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<sup>18</sup>Even if there were complete diversity of citizenship between all the members of the plaintiff Union and the defendant, as the Union alleged in its motion to amend its complaint (R. 57), the present action could not be maintained under 28 U.S.C. §1332(a)(1) on grounds of diversity of citizenship, since the plaintiff Union had no capacity to bring the action. Section 17(b) of the Federal Rules of Civil Procedure provides that the capacity of an unincorporated association to sue "shall be determined by the law of the state in which the district court is held" unless it is suing to enforce "a substantive right existing under the laws of the United States". As

Nor can jurisdiction under Title 28 be supported on the theory that the case "arises under the Constitution, laws or treaties of the United States," within the meaning of §1331 of Title 28. The disputes as to whether Boiardi had been properly paid and Armstrong properly discharged involve a question of the interpretation of the collective agreement between the parties. The rights sought to be vindicated are rights created by and arising out of the contract, not federal law. It is well settled that cases involving breaches of a collective agreement do not arise under the laws of the United States simply because the agreement was entered into by parties subject to the National Labor Relations Act,<sup>19</sup> or the Railway Labor Act,<sup>20</sup> or the Labor Management Relations Act.<sup>21</sup> A suit does not arise under a federal

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<sup>19</sup>*Schatté v. International Alliance of Theatrical Stage Employees*, 70 F. Supp. 1008 (S.D. Calif. 1947), *aff'd* 165 F. 2d 216 (9th Cir. 1948), *cert. denied* 334 U.S. 812 (1948); *Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees v. Southern Bus Lines, Inc.*, 189 F. 2d 219 (5th Cir. 1951).

<sup>20</sup>*Starke v. New York, Chicago & St. Louis R. Co.*, 180 F. 2d 569 (7th Cir. 1950); *Barnhart v. Western Maryland Ry. Co.*, 128 F. 2d 700 (4th Cir. 1942), *cert. denied* 317 U.S. 671 (1942); *Burke v. Union Pacific R. Co.*, 129 F. 2d 844 (10th Cir. 1942); *International Union United Automobile, Etc. Workers v. Delta Air Lines*, 83 F. Supp. 63 (N.D. Ga. 1949); see *Cepero v. Pan American Airways*, 195 F. 2d 453, 455 (1st Cir. 1952).

<sup>21</sup>*International Ladies' Garment Workers Union v. Jay-Amer Co.*, 228 F. 2d 632 (5th Cir. 1956); *Silvertone v. Valley Transit Cement Co.*, 140 F. Supp. 709 (S.D. Calif. 1955).

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we show in the body of the Brief, *infra*, the substantive right which the Union is asserting here is a right arising out of a contract, not one created by United States statute. For purposes of determining whether jurisdiction exists under 28 U.S.C. §1332(a)(1) therefore, the law of Massachusetts necessarily governs the question of capacity to sue. Under that law an unincorporated association cannot bring an action. *Tyler v. Boot & Shoe Workers Union*, 285 Mass. 54 (1933); *Donovan v. Danielson*, 244 Mass. 432 (1923). Accordingly, the district court would have had no jurisdiction on diversity grounds even if the proposed amendment had been allowed.

law unless it "really and substantially involves a dispute or controversy respecting the validity, construction or effect of such law". *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912); *Gully v. First National Bank*, 299 U.S. 109, 114 (1936).

Not only did the court below overlook the requirement of § 4 that jurisdiction must be founded on Title 28, it also ignored the provision that jurisdiction is to be tested "save for the agreement to arbitrate". In holding that the complaint in the present action met the terms of §301 (and, therefore, satisfied § 4 of the Arbitration Act), the court found that §301 was complied with because the union sought enforcement of an agreement to arbitrate running to it and not merely relief available to the individual employee (R. 80). But as we have shown, the controversy over the failure to perform a promise to arbitrate cannot be the subject matter of the controversy within the meaning of § 4. It is the underlying dispute, the subject matter of the controversy of which arbitration is sought, that is the test of jurisdiction. Here, the subject matter of that controversy was the rate of pay of one employee and the propriety of the discharge of another. Over that subject matter the district court had no jurisdiction under §301, since it involved "terms peculiar in the individual benefit which is their subject matter" involving the "uniquely personal right of an employee". *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 460, 461 (1955). It follows that even if jurisdiction under § 301 over the subject matter of the underlying dispute would satisfy § 4, such jurisdiction cannot be found in the present case. Accordingly, the district court had no

power under the Act to order arbitration even if the contract in question was made valid and enforceable by §§ 1 and 2 of the Act.

## II.

THE COURT BELOW WAS CORRECT IN RULING THAT SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 CANNOT PROVIDE THE BASIS FOR THE SPECIFIC ENFORCEMENT OF AN EXECUTORY AGREEMENT TO ARBITRATE.

If this Court determines that the United States Arbitration Act excludes collective bargaining agreements from its coverage, the judgment of the Court of Appeals in this case must be reversed. For there is no other basis on which arbitration may be compelled. The court below was correct in holding that, in the absence of express statutory direction, an executory agreement to arbitrate cannot be specifically enforced, and that § 301(a) of the Labor Management Relations Act does not provide any such right.

This Court held in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 350 U.S. 437 (1955), that, in view of its language and legislative history, § 301(a) cannot be read to extend the jurisdiction of the federal courts to suits by labor unions seeking to enforce basically personal rights of employees. In the words of Mr. Justice Frankfurter, "Congress did not confer on the Federal courts jurisdiction over a suit such as this one." 348 U.S. at 461. The Chief Justice in his concurring opinion, *ibid.*, stated that the only issue before the Court was "one of statutory interpretation," and agreed that Congress did not intend to

make the federal courts available for suits such as that in question.

The issue in the present case is of precisely the same nature as in *Westinghouse*: What is the scope of the extended jurisdiction which Congress intended the federal courts to exercise under § 301? Here, as in *Westinghouse*, the question is whether Congress intended the federal courts to be available for a particular type of action—in this case actions to compel arbitration. The language and legislative history of § 301 are clearer than federal courts were not to be opened to actions of that nature, than with respect to the type of suit involved in the *Westinghouse* case. For in enacting § 301 Congress was operating against a background of a clear federal and state common law rule that arbitration agreements are not specifically enforceable, and of repeated consideration and rejection by earlier Congresses of proposals which would have effected a change in this rule; and nonetheless Congress made it clear that § 301 was not to change this rule—that is was not intended to open the federal courts to a litigant seeking a form of relief previously not available.

#### A. *As a Matter of Basic Contract Law, Executory Agreements to Arbitrate Are Not Specifically Enforceable.*

It is a fundamental and long-settled principle of contract law that executory agreements to arbitrate future disputes under a contract are not specifically enforceable. RESTATEMENT, CONTRACTS § 550 (1932); 6 WILLISTON, CONTRACTS (Rev. Ed.1938) § 1919. That rule obtains as fully in federal as in state courts. See, e.g., *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120-121 (1924); *Simmons Co. v. Crew*, 84 F. 2d 82 (4th

Cir. 1936) cert. den. 299 U.S. 569 (1936); *Tejas Development Co. v. McGough Bros.*, 165 F. 2d 276, 279-80 (5th Cir. 1947); *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S.D.N.Y. 1915).

There are strong practical reasons for this rule. As the court below pointed out, (R. 73), the courts cannot provide the "comprehensive and consistent scheme that legislative action could afford" with respect to such matters, for example, as stay of court proceedings and procedure for confirming or vacating an award without which any effective enforcement of the agreement to arbitrate must fail.

The only changes in the settled common law rule have been as a result of statutes which by their terms provide for specific enforcement. Several states have provided by statute for the specific enforcement of some types of agreements to arbitrate, although there is no consistent pattern of state legislation on this point. See *Gregory and Orlikoff, The Enforcement of Labor Arbitration Agreements*, 17 CHIC. L. REV. 233, 238-45 (1950); 6 WILLISTON, CONTRACTS § 1920 (Rev. Ed. 1938). And Congress itself made certain types of commercial arbitration contracts enforceable through enactment of the United States Arbitration Act.

On the occasions, prior to 1947, when Congress considered arbitration legislation it clearly revealed its judgment that agreements to arbitrate labor controversies should not be specifically enforceable. Thus, labor controversies were excluded from the scope of the United States Arbitration Act. And in 1926, the year after the enactment of the United States Arbitration

Act, Congress provided for voluntary arbitration in the Railway Labor Act. There, it carefully set up the machinery and detailed procedure for arbitration, but expressly provided that failure to arbitrate shall not be "a violation of any legal obligation". (Railway Labor Act, § 7, 44 Stat. 582, as amended, 45 U.S.C. § 157).

The legislative history of the original Wagner Act shows that there was also extensive consideration of the problem of arbitration in both 1934 and 1935. Senator Wagner's original bill, S. 2926, 73d Cong., 2d Sess. (1934), as amended and reported by the Committee on Education and Labor, contained in § 9(a) a lengthy provision providing for administration and enforcement of arbitration agreements by the Labor Board when the parties had voluntarily agreed to submit a labor dispute to it. A similar provision was contained in H.R. 8423, 73d Cong., 2d Sess. (1934). In the 74th Congress, Senator Wagner introduced S. 1958, 74th Cong. 1st Sess. (1935), which continued the provision with respect to enforcement of agreements to arbitrate when submitted to the Board (§ 12). This proposal which would have, in general, paralleled the arbitration provisions of the Railway Labor Act, was dropped from the Senate Bill without explanation, shortly before its passage. S. 1958 (2d Senate print), 74th Cong., 1st Sess. (1935). Similar provisions pertaining to arbitration were considered, but not finally adopted, by the House in H.R. 6187 and H.R. 6228, 74th Cong., 1st Sess. (1935). And again in 1942 Congress had before it a proposal for enforcement of labor arbitration agreements and, as shown above (*IA Supra*), took no action to do so.

B. *The Language of § 301(a) of the Labor Management Relations Act and the Structure and Legislative History of the Act Show No Intention on the Part of Congress to Have § 301(a) Open the Federal Courts to Actions for the Specific Enforcement of Arbitration Provisions in Collective Bargaining Agreements.*

It is in the context of the unequivocal judicial rule, described above, against the specific enforcement of arbitration agreements and the repeated refusals of Congress to provide for such enforcement in the labor field, that the consideration and enactment of § 301 must be viewed. A legislative decision to provide for such specific enforcement would have been a complete turnaround and one could expect that Congress would have spoken clearly if that had been its intent. On the contrary, the language of § 301 itself, a comparison with other sections of the Act, and the legislative history make it clear beyond a doubt that Congress did not intend to work such a change in the long-settled judicial rule.

1. *The language and context of the section.*

In terms, § 301(a) does not contain any suggestion that the federal courts were being opened to a remedy not previously available—specific performance of arbitration provisions in union contracts. The section contains not a word as to arbitration, enforcement, injunctions or any other new remedy.

The plain and obvious meaning of the words of that section is simply that the federal courts were to be opened to proceedings for violation of collective bar-

gaining contracts regardless of diversity of citizenship or jurisdictional amount, where, prior to § 301(a), those requirements would have barred jurisdiction.<sup>22</sup> The section did not remove these jurisdictional limitations with respect to cases in which prior to its enactment the federal courts could not have provided relief.

This conclusion is reinforced by comparing subsection (a) of § 301 with subsections (b), (c) and (d), where Congress dealt in detail with procedural matters. Thus, subsection (b) provides how a money judgment against a labor organization may be enforced; subsection (c) deals with the venue of suits by or against unions; and subsection (d) with the method of service of process upon unions. Since, in § 301, Congress was focussing its attention upon procedure and remedies, it certainly would have dealt expressly with new remedies had it been its intention to create any.

Examination of the Act as a whole further supports the view that § 301(a) was not intended to give the federal courts jurisdiction over suits to compel performance of labor arbitration agreements. In other sections of the Act, where Congress intended to authorize enforcement by way of an injunction or other

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<sup>22</sup>It has been suggested that the unqualified use of the word "suits" in § 301(a) shows Congress intended to add the new remedy of specific enforcement of arbitration agreements. See *Milk and Ice Cream Drivers Union v. Gillespie Milk Prod. Corp.*, 203 F. 2d 650, 651 (6th Cir. 1953). Of course, no such significance can be given to the use of that word. "Suits", for example, was used throughout Section 24 of the old Judicial Code, 36 Stat. 1091 (1911), which conferred jurisdiction on the district courts over "suits of a civil nature, at common law or in equity" in various instances. Yet, as we have shown, the federal courts in exercising their jurisdiction over suits in equity, consistently held that they could not compel specific performance of an executory agreement to arbitrate.

decree, it carefully spelled out the circumstances under which, and the persons by whom, such equitable relief could be obtained. Thus, Courts of Appeal are vested with "power to grant such temporary relief or restraining order" and to make a decree "enforcing" orders of the National Relations Board (§ 10(e), 29 U.S.C. § 160(e)); district courts are authorized to grant a "restraining order" and "injunctive relief" against unfair labor practices upon petition of the Board (§§ 10(j), 10(1), 29 U.S.C. §§ 160(j), 160(1); to "enjoin" certain strikes upon petition of the Attorney General (§§ 208, 29 U.S.C. § 178) and to "restrain violations" of the prohibition against certain payments to labor organizations (§ 302, 29 U.S.C. § 186); and all courts are expressly prohibited from issuing "any process to compel the performance by an individual employee" of labor or services (§ 502, 29 U.S.C. § 143).

It is far-fetched, to say the least, to suppose that Congress, in the same Act in which it spelled out in this great detail forms of equitable enforcement which were to be available in particular situations, intended the general language of § 301(a) to reverse the long-settled rule with respect to specific enforcement of arbitration provisions. If such had been Congress' intention, it cannot be found in what Congress said.

## 2. *The legislative history of § 301.*

The *Westinghouse* case traces in detail the legislative history of § 301(a) and § 10 of the so-called "Case bill" from which § 301(a) was largely derived, 348 U. S. 444-449. There is nothing in this history which even remotely suggests that one of Congress' purposes

in enacting § 301 was to extend the jurisdiction of the federal courts to actions seeking specific enforcement of arbitration agreements.

Indeed, far from indicating that § 301 was intended to authorize this form of relief, the legislative history strongly suggests that no equitable remedies of any sort are available under § 301 and that its sole purpose was to authorize damage actions. The reports on the Senate and House bills<sup>23</sup>, and the agreements reached in conference<sup>24</sup> all suggest strongly that the only purpose of § 301 was to authorize damage actions. Similarly, in the debates on the bill, members of both houses repeatedly evidenced their persistent belief that the section related only to damage actions.<sup>25</sup>

<sup>23</sup>SEN. REP. No. 105, 80th Cong. 1st Sess. pp. 15-16 (1947) :

"Accordingly, the difficulty or impossibility of enforcing the terms of a collective agreement in a suit at law arises from the fact that each individual member of the union must be named and made a party to the suit. \* \* \* Even where unions are suable the *union funds may not be reached for payment of damages* \* \* \* " (Italics supplied)

H. R. REP. No. 245, 80th Cong. 1st Sess. pp. 45-46 (1947).

<sup>24</sup>Senator Taft in explaining to the Senate the agreement reached in Congress stated:

"The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (section 301)." 93 CONG. REC. 6600 (1947). (Italics supplied)

<sup>25</sup>See, for example, the following:

Representative Case: "... Both in the bill last year, and in this Taft-Hartley bill, the language while making labor organizations responsible under their contracts and for the acts of their agents, limits judgments to the assets of the organization itself." 93 CONG. REC. 6438 (1947).

But the issues in the present case make it unnecessary for the Court to pass at this time upon whether § 301 opened the federal courts only to damage actions or whether the federal courts can grant equitable relief in some cases. For the only question here is whether § 301(a) added jurisdiction to grant equitable relief in a situation where it was not available in the federal courts prior thereto.

The legislative history reviewed in the *Westinghouse* case establishes that the jurisdictional requirements of diversity and amount in controversy were removed with respect to claims for relief which the federal courts would have been able to grant but for those requirements—not with respect to new causes of action. Even more significant for purposes of this case is the legislative history which shows that Congress specifically considered and decided against providing for the enforcement of arbitration agreements.

Representative Robison: ". . . the party who is at fault must respond in fair and just damages." 93 CONG. REC. 7506 (1947).

Senator Smith: "whichever side is guilty of violating a contract solemnly entered into shall be responsible for damages resulting from such violation." 93 CONG. REC. 4410 (1947).

Senator Wiley: "Unions should be liable for damages if they break contracts just as businesses are liable." (93 CONG. REC. 5134 (1947)).

See also the President's veto message which reflects his understanding that Section 301 was to be limited to damage suits:

"\* \* \* In introducing damage suits as a possible substitute for grievance machinery, the bill rejects entirely the informed wisdom of those experienced in labor relations." 93 CONG. REC. 7501 (1947).

Thus, the original Senate Bill as reported (S. 1126, 80th Cong., 1st Sess.) expressly made it an unfair labor practice for an employer or a labor organization "to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration" (§ 8(a)(6), 8(b)(5)); and empowered the National Labor Relations Board to issue orders requiring any persons to cease and desist from any unfair labor practice (§ 10(c)) and Courts of Appeal to make decrees enforcing such Board orders (§ 10(h)).<sup>26</sup>

The House Bill, as passed by the House (H.R. 3020, 80th Cong., 1st Sess.), dealt with the same subject in a slightly different way. It defined (§ 2(11)) the terms "bargain collectively" and "collective bargaining" as meaning, among other things: "(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such dispute, following such procedure"; and it made it an unfair labor practice for employers, employees or labor organization "to refuse to bargain collectively" (§§ 8(a)(5), 8(b)(2)).<sup>27</sup>

These provisions, which for the first time would have established a procedure for enforcement of arbitration provisions in labor agreements, were dropped entirely after conference. The House Conference Report (HOUSE CONF. REP. No. 510 on H.R. 3020, 80th Cong., 1st Sess.) stated:

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<sup>26</sup>This provision was discussed at some length in both the Senate majority and minority reports on the Bill. See SEN. REP. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 20, 23 (1947); Minority Report No. 105, 80th Cong., 1st Sess., pp 12, 13 (1947).

<sup>27</sup>See discussion of this proposal in the majority and minority reports on the Bill, House Report No 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 19-21 (1947); House Minority Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 368, 374 (1947).

"In addition, the conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract"<sup>28</sup> (p. 39).

"The Senate amendment contained a provision which does not appear in Section 8 of the existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once the parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of law and not to the Labor Relations Board." (pp. 41-42).

As we have already shown, under such "usual processes of law", agreements to arbitrate were not enforceable by an injunction or a decree.

Moreover, both Houses of Congress had before them at the same time proposals for compulsory arbitration in certain labor disputes. Bills to compel arbitration

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<sup>28</sup>See also Senator Taft's explanation of the conference agreement to Senate:

"When the bill passed the Senate it also contained a sixth paragraph in this subsection which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. . . . The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in subsection 8(b)(5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate collective bargaining agreements. 93 CONG. REC. 6600 (1947)."

in the event of strikes affecting the public interest were introduced in the House by Representative Case and others (93 CONG. REC. A 1069-1072 (1947)), and Senator Morse proposed amendments to the Senate bill to provide for arbitration in the event of jurisdictional disputes (93 CONG. REC. 1912-1913 (1947)). None of these proposals was adopted.

If one thing is clear, it is that the Congress which enacted the Labor Management Relations Act was fully aware of the problems of arbitration in the labor field, deliberately stopped short of providing enforcement through judicial or other process. Indeed, that very same Congress, at the same session, repealed and re-enacted the United States Arbitration Act without change, leaving the express exclusion of labor agreements still in that law. 61 Stat. 669, 9 U.S.C. §§ 1-14 (Supp. 1952).

Thus, for the reasons set forth by Mr. Justice Frankfurter and the Chief Justice in the *Westinghouse* case, the court below was correct in holding that § 301 did not make the federal courts available for the specific performance of agreements to arbitrate. For whether § 301(a) be regarded solely as jurisdictional or as providing both jurisdiction and substantive rights, it is clear that a plaintiff's case is never properly in the federal court if it is not one for which Congress intended § 301 to authorize the federal courts to grant relief. This case, like *Westinghouse*, does not require the Court to consider the constitutionality of § 301 or to face the intricacies of choosing between state and federal law. For here again all that the Court is called upon to decide is whether § 301(a) evidences Congress' intention to open the federal courts to a specific type of case. As in *Westinghouse* every indication of congressional intent calls for a negative answer.

C. *Even if § 301(a) Were Held to Afford the Jurisdiction of the Federal Courts to this Cause of Action, Specific Enforcement of the Arbitration Agreement Would Be Barred whether Federal or State Law Were Held Applicable.*

If the Court should determine that a plaintiff seeking specific enforcement of a labor arbitration agreement is not barred at the threshold of the federal court, the plaintiff must still show that under the applicable law he is entitled to recover in that court.

To the extent federal law is applicable it clearly bars the relief the respondent seeks. The federal rule, as enunciated by Justice Brandeis in *Red Cross Lines v. Atlantic Fruit Co.*, 264 U.S. 109 (1924), is clear that the federal courts will not compel specific performance of executory agreements to arbitrate. As shown above, from the United States Arbitration Act in 1925 through the Taft-Hartley Act in 1947, Congress consistently declined to change this rule with respect to labor agreements.

As the court below stated (R. 73), the courts ought not to ignore this long-standing federal rule "without a pretty explicit statutory basis for so doing." Surely they ought not to do so when Congress has repeatedly reaffirmed this rule itself.

If the view is taken that § 301 does something more than expand the jurisdiction of the federal courts, and that it envisions a body of federal substantive law applicable in § 301 cases, this still does not justify the judiciary in overturning that rule. It is one thing to read § 301(a) as authorizing the courts to fill in gaps in the federal statutory law. It is quite another to find

in Congress' repeated decision not to compel labor arbitration an intention that Congress wanted the courts to do an "about face". To do this the Court would have to attribute to Congress an intention it never expressed and which, as the legislative history conclusively establishes, it never entertained.

Such judicial law-making is particularly inappropriate in the field of labor arbitration. For even if the Court should ignore Congress' own policy decision on this matter and overturn the present federal rule, there would still be lacking, as Judge Magruder pointed out (R. 73), "the procedural specifications needed for administration of the power to compel arbitration". And the courts are not the proper arena in which the questions as to what provisions are appropriate in a federal labor arbitration statute should be argued and determined. So basic, complex and far-reaching a change in federal labor policy, if it is to be made at all, should be made by Congress.

If it should be held that under § 301(a) the federal courts are on some matters to look to the law of the states, it nonetheless seems unlikely that the question of the remedies to be given by the federal courts under § 301(a) is to be governed by state law, particularly on a question where, as shown above, there is clear federal law. Cf. *Just v. Chambers*, 312 U.S. 383 (1941). But even; if this Court's holding in *Bernhardt v. Polygraphic Co.* 350 U.S. 198 (1956), is applicable to cases in which jurisdiction is sought to be based on § 301, and Massachusetts law is therefore applicable, the agreement to arbitrate would still not be enforceable.

Executory agreements to arbitrate were not specifically enforceable at common law in Massachusetts (see e.g. *Rosenblum v. Springfield Produce Brokerage Co.*, 243 Mass. 111 (1922); *Noyes v. Marsh*, 123 Mass. 286 (1877), and the limited statutory provision for the enforcement of arbitration agreements enacted in 1925 (G. L. (Ter. Ed.) c. 251, §§ 14-22) has been narrowly construed to exclude the enforcements of an arbitration provisions like that in issue in this case. See e.g., *Cochrane v. Forbes*, 257 Mass. 135, 143 (1926); *Cueroni v. Coburnville Garage, Inc.*, 315 Mass. 135, 141, (1943); *Sanford v. Boston Edison Co.*, 316 Mass. 631, 636 (1944). The common law rule was not changed by § 11 of G. L. (Ter. Ed.) c. 150, enacted in 1949. That section provided merely that if the parties agreed that the determination of the arbitrators should be final, "such determination shall be . . . enforceable by proper judicial proceedings." (emphasis supplied) It carefully distinguished between judicial enforcement of the executory agreement and of the award which might be rendered pursuant to the agreement. And it did so shortly after the Supreme Judicial Court had squarely reaffirmed the common law rule that an executory agreement in a labor contract was not specifically enforceable. *Sanford v. Boston Edison Co.*, *supra*, at 636. What § 11 did was to authorize enforcement of awards, which might otherwise have been unenforceable, by means of remedies previously unavailable. Cf. *Magliozzi v. Handschumacher & Co., Inc.*, 327 Mass. 569 (1951). That is something quite different from creating a right to enforcement of the executory agreement itself.

D: *Since This Action Seeks To Enforce Rights Personal To Individual Employees It May Not Be Brought By The Union Under § 301(a).*

There is a further reason for holding that § 301(a) does not authorize specific performance of the arbitration provision here in question. The *Westinghouse* case held that § 301(a) did not authorize suits in the federal courts to enforce the personal rights of employees. What the union seeks to enforce in the present case are the right of Mr. Boiardi to receive a higher rate of pay and the right of Mr. Armstrong to be reinstated after his discharge. These rights are no less personal to the employees because here the union seeks to enforce them by compelling arbitration rather than by a suit for a declaratory judgment as in *Westinghouse*.

The court below distinguished this case from *Westinghouse* on the ground that if suits to compel arbitration were deemed personal to the employee involved, "there would be no significant use a union could make of § 301" (p. 46). This reasoning disregards completely the many provisions of collective bargaining agreement, such as agreements to employ union labor, and check-off of dues, peculiar in interest to the union itself.

In the *Westinghouse* case, the union was seeking a declaratory judgment with respect to the rights of some 4,000 employees to receive pay for a day when they were absent from work. It would be anomalous indeed to hold that Congress, which, as Justice Frankfurter said in *Westinghouse*, was concerned with congestion in the federal courts, intended to bar suits by unions to establish the right of a large group of employees to additional pay, but to permit a union to bring before the federal court, by way of an action to compel arbitration, every small individual grievance which cannot be resolved with management.

### III.

#### UNDER THE NORRIS-LA GUARDIA ACT A FEDERAL COURT HAS NO JURISDICTION TO COMPEL ARBITRATION OF A LABOR DISPUTE

Section 1 of the Norris-LaGuardia Act deprives the federal courts of jurisdiction to issue *any* restraining order or temporary or permanent injunction "in a case involving or growing out of a labor dispute", except in "*strict conformity*" with the provisions of the Act. The union's amended complaint in the present action alleges that the employee Boiardi was "paid at a lower rate of pay than specified in his job classification" (R. 44), that the employee Armstrong was arbitrarily and improperly discharged (R. 45), and that the plaintiff processed both grievances "without reaching agreement with defendant" (R. 44, 46). The action thus involves "a controversy concerning terms or conditions of employment" between an employer and an association of employees, and constitutes a "labor dis-

pute" as that term is defined in § 13 of the Norris-La-Guardia Act. As the court below held (R. 63), a dispute between an employer and a union over "terms or conditions of employment" is nonetheless a "labor dispute" because those terms or conditions are spelled out in a collective bargaining agreement. *W. L. Mead Inc. v. International Brotherhood of Teamsters*, 217 F. 2d 6 (1st Cir. 1954); *In re Third Avenue Transit Corp.*, 192 F. 2d 971 (2d Cir. 1951); *Alcoa Steamship Co., Inc. v. McMahon*, 73 F. 2d 567 (2d Cir. 1949); Cf. *United States v. United Mine Workers*, 330 U.S. 258, 270-271, 312-313 (1947).

Since a "labor dispute" was involved, the court had no power to compel arbitration unless the provisions of § 7 of the Act were complied with. That section provides that "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute" except upon findings of certain specified facts made after hearing testimony of witnesses "in support of the allegations of a complaint made under oath". Neither the original (R. 3) or amended (R. 42) complaint contained the requisite allegations, under oath, of the jurisdictional facts upon which the necessary findings could be made. Clearly, under the terms of § 7, a federal court could not grant the relief sought. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938); *Wilson & Co. v. Birl*, 105 F. 2d 948 (3d Cir. 1939).

The court below correctly ruled (R. 64) that § 7 is not inapplicable on the theory that the relief sought was an order or decree for "specific performance" rather than an "injunction". Any such distinction

is one of words only. An "injunction", either mandatory or prohibitory, is the means by which specific performance is enforced. *Joy v. St. Louis*, 138 U.S. 1, 46 (1891); POMEROY, EQUITABLE JURISPRUDENCE § 1341 (5th ed. 1941); LEWIS & SPELLING, LAW OF INJUNCTIONS § 129 (1926). The power of a court to issue an "order" or "decree" compelling performance of a contract is governed by the same rules and principles as its power to grant an "injunction" against non-performance. *Shubert v. Woodward*, 167 Fed. 47, 52 (8th Cir. 1909); *Engemoen v. Rea*, 26 F. 2d 576, 578; *Arizona Edison Co. v. Southern Sierras Power Co.*, 17 F. 2d 739, 740 (9th Cir. 1927). For all practical purposes an order unequivocally directing performance is an "injunction". *Independent Petroleum Workers of New Jersey v. Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956); *United States v. Kovich*, 201 F. 2d 470 (7th Cir. 1953); *Red Star Laboratories v. Pabst*, 100 F. 2d 1 (7th Cir. 1938). To hold otherwise would mean, for example, that despite the explicit prohibition of § 4 of the Act against enjoining a strike, a no-strike clause could be enforced by the simple device of labelling the court's order a "decree for specific performance" rather than an "injunction". Obviously that would be a mere play upon words. The courts have refused to employ such verbal subterfuges. See, e.g., *Alcoa S. S. Co. v. McMahón*, 81 F. Supp. 541 (S.D.N.Y. 1948), aff'd 173 F. 2d 567 (2nd Cir. 1949) cert. denied 338 U.S. 821 (1949); *Colorado-Wyoming Express v. Denver Local Union No. 13*, 35 F. Supp. 155 (D. Colo. 1940).

Although admitting that the relief sought was an "injunction" and that the case involved a "labor dispute", the court below held that § 7 of the Act was

nevertheless inapplicable. It ruled that the plain words of that section denying jurisdiction to issue an "injunction in any case involving or growing out of a labor dispute" did not include injunctions against an employer's breach of a contract to arbitrate, since the only "injunctions" at which the section was aimed were those prohibiting "unilateral coercive conduct" (R. 64), such as "union conduct in strikes and picketing" (R. 65). In effect, it read the words "injunction in any case" as if they said "injunction in certain types of cases".

In § 4 of the Act Congress did expressly bar federal courts from enjoining certain specific types of acts, including strikes, picketing and boycotting—the kind of "unilateral coercive conduct" to which the court below referred. But the Act is not confined to § 4. § 1 sweepingly prohibits *any* injunction, regardless of the type of conduct involved, *in any case of a labor dispute* except in conformity with § 7. The latter section repeats the same unequivocal prohibition, and then spells out the single instance in which injunctive relief can be given—namely, against unlawful acts causing irreparable injury to property for which there is no adequate police protection. Faced with what it believed to have been an unwarranted judicial erosion of the prohibitions of § 20 of the Clayton Act, Congress removed the federal courts entirely from any involvement in the whole area of labor controversies. The flat prohibition of §§ 1 and 7 against any injunction, and the very broad definition of "labor dispute" in § 13, make it plain that Congress intended "to take the Federal courts out of the business of granting injunctions in labor disputes, except where violence or fraud are present", *Wilson &*

*Co. v. Birl*, 105 F. 2d 948, 953 (3rd Cir. 1939). As this Court said, in *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 101 (1940), after quoting § 1 of the Act:

"This unequivocal jurisdictional limitation is reiterated in other sections of the Act. The Norris-LaGuardia Act—considered as a whole and in its various parts—was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes."

The court below supported its conclusion that the term "injunction" in § 7 did not include an injunction against an employer's breach of contract, by arguing that in such cases the required allegations and findings could seldom, if ever, be made (R. 66). In effect, that is to say that if a statute contains only a very narrow exception, the statutory command should be interpreted as not applying to cases which it is difficult, or impossible, to bring within the exception. Such reasoning makes §§ 1 and 7 of the Act practically meaningless. Indeed, the court below assumed the very point at issue in stating that Congress would have created "a snare and a delusion" (R. 66) if it had held out the possibility of jurisdiction but had demanded allegations and findings of inapposite facts as a prerequisite to the exercise of jurisdiction. Perhaps this might be so if Congress had held out such a possibility. But the language of the Act shows that it did not hold out any possibility of an injunction in any case of a labor dispute except in the very limited class of cases involving fraud or violence.

The reasoning of the court below runs squarely counter to a long line of decisions holding that the pro-

hibition of § 7 is not confined to cases of unilateral coercive conduct, such as that incident to strikes, picketing or boycotts. Again and again that section has been applied to bar injunctions against such non-coercive conduct as breaches of obligations under statutes or contracts, both in actions brought by unions as well as those by employers.<sup>29</sup>

<sup>29</sup>See, e.g., *Stanley v. Peabody Coal Co.*, 5 F. Supp. 612 (S.D. Ill. 1933) (union injunction to compel mine owners to comply with Bituminous Coal Code); *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (N.D. Ga. 1936) (union injunction to prevent use of Mediation Board certificate designating rival union bargaining representative under Railway Labor Act); *Moreschi v. Mosteller*, 28 F. Supp. 613 (W.D. Penn. 1939) (union injunction against employer's breach of agreement to employ only union labor); *Green v. Obergfell*, 121 F. 2d 46 (D.C. Cir. 1941) (union injunction to prevent parent union transferring jurisdiction over class of workers to another union); *Burlington Mills Corp. v. Textile Workers Union*, 44 F. Supp. 699 (W.D. Va. 1941) (employer injunction to prevent union filing unfair labor practice charge); *Wilson Employees Representation Plan v. Wilson & Co.*, 53 F. Supp. 23 (S.D. Calif. 1943) (union injunction against employer's breach of collective agreement); *United Packing House Workers v. Wilson & Co.*, 80 F. Supp. 563 (N.D. Ill. 1948) (same); *Lee Way Motor Freight, Inc. v. Key-stone Freight Lines, Inc.*, 126 F. 2d 931 (10th Cir. 1942) (injunction by trucker to compel motor carriers to intercharge freight); *South-eastern Motor Lines v. Hoover Truck Co.*, 34 F. Supp. 390 (M.D. Tenn. 1940) (same); *East Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 163 F. 2d 10 (5th Cir. 1947) (same); *California Ass'n v. Building Trades Council*, 178 F. 2d 175 (9th Cir. 1949) (injunction against union's refusal to bargain); *Missouri-Kansas-Texas R. Co. v. Randolph*, 164 F. 2d 4 (8th Cir. 1947), cert. denied 334 U.S. 818 (1948) (union injunction against employer's cancelling collective agreement); *Duris v. Phelps Dodge Copper Products Corporation*, 87 F. Supp. 229 (D.N.J. 1949) (union injunction to compel employer to give full force and effect to collective agreement, in particular checkoff and recognition clauses); *Wilson v. Dias*, 72 F. Supp. 198 (E.D. Pa. 1947) (suit between unions); *Fitzgerald v. Abramson*, 89 F. Supp. 504 (S.D.N.Y. 1950) (union injunction against rival union accepting dues checked off by employer).

In enacting the Act, Congress was aware that § 7 would bar relief in types of cases which could never be brought within its exception. Thus, in the course of the Senate debate on the bill, Senator Steiwer pointed out that employees had in the past, and might well in the future, seek an injunction against employers in circumstances where there were no "unlawful acts" within the meaning of § 7 and that in such a case relief would be barred. 75 CONG. REC. 4936, 4938. Supporters of the bill did not deny that such would be the case. They simply labelled the point as "academic". (75 CONG. REC. 4936, 4938). But no one suggested that the Act would not apply to such a situation.

The court below found support for its position in the decisions of this Court holding that the Norris-LaGuardia Act is not a bar to injunctions to compel compliance with the positive statutory mandates of the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* *Virginia R. Co. v. System Federation*, 300 U.S. 515 (1937); *Graham v. Brotherhood of Firemen* 338 U.S. 232 (1949). However, in those cases the plaintiffs were seeking to enforce an express right created by statute. This Court's conclusion that an injunction was not prohibited rested on the ground that the specific provisions of the Railway Labor Act repealed "the earlier and more general provisions of the Norris-LaGuardia Act". *Virginia R. Co. v. System Federation*, *supra*, at 563. As this Court said in the *Graham* case (338 U.S. 232, 237), to hold that the earlier act deprived employees of means of enforcing the bargaining rights specifically accorded by the Railway Labor Act would mean that "congress intended to hold out to them an illusory right

for which it was denying them a remedy" (338 U.S. at 240).<sup>30</sup>

The instant case presents an entirely different situation. The union here is not seeking to enforce a specific substantive right created by any federal statute. It is trying to compel performance of a contractual obligation. The court below itself held (R. 62) that there is no basis for regarding any section of the Norris-LaGuardia Act as having been repealed by § 301 of the Labor Management Relations Act under which the present action is brought. Indeed, that is conclusively settled. *Bakery Sales Drivers Local Union v. Wagshal*, 333 U.S. 437, 442 (1948); *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, 217 F. 2d 6 (1st Cir. 1954); *Alcoa S. S. Co., Inc. v. McMahon*, 81 F. Supp. 541 (S.D.N.Y. 1948), aff'd 173 F. 2d 567 (2d Cir. 1949).

The court's decision that § 7 applies only in circumstances of coercive conduct of the type which could

<sup>30</sup>The case of *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955), *re hearing denied*, 350 U.S. 943 (1955), does not, as the court below suggested (R. 65), indicate an extension of the power to issue injunctions despite the provisions of the Norris-LaGuardia Act. In that case, negro employees brought an action attacking as illegal a collective agreement entered into by their bargaining representatives, on the ground that the seniority provisions of the agreement discriminated against them solely on account of race. The complaint sought a declaratory judgment that the contract was void, an injunction against its enforcement, and also damages. The District Court dismissed the complaint as a whole, holding that a federal court had no jurisdiction since the cause of action did not arise under the Constitution or laws of the United States, and the Court of Appeals affirmed (223 F. 2d 739 (5th Cir. 1955)). No question as to the applicability of the Norris-LaGuardia Act was raised. In reversing, in a *per curiam* opinion, and remanding the case for further proceedings, this Court did not, and had no occasion to, consider whether an injunction should be denied. All that was decided was that the cause of action alleged did arise under the laws of the United States.

result in violence, not only distorts the plain words of the Act but reaches a result which is inequitable and at variance with Congressional policy. The practical effect of that holding is to make arbitration agreements specifically enforceable only as against employers. A union, if it does not choose to submit to arbitration can strike and be protected by § 4. While such a strike "theoretically is not a bar to arbitration", for all practical purposes it is (See R. 68). Moreover, if the union did submit to arbitration and the award went against it, it could then strike rather than accept the award, and a federal court would be powerless to prevent its doing so. *Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co.*, 229 F. 2d 901 (5th Cir. 1956).

The court's decision, moreover, applies not only to arbitration clauses, but opens up the whole field of labor contracts to policing by injunctive process. Indeed, the Court of Appeals for the Third Circuit has very recently held, in reliance on the decision of the court below in this case, that the Norris-LaGuardia Act has no application to a union's action to enforce terms of the collective agreement other than the arbitration clause. *Independent Petroleum Workers of New Jersey v. Esso Standard Oil Co.*, 235 F. 2d 401 (3d Cir. 1956).

Similarly, breaches by unions of obligations undertaken by them, either with employers or with other unions, would be subject to injunction unless the breach happened to involve conduct of the type specified in § 4. As the collective bargaining relationship between employers and unions matures it is inevitable that more and more labor disputes will tend to be "non-coercive" in character. So, too, will the disputes between unions.

The decision below would subject to the injunctive processes of the federal courts a vast range of labor controversies, the precise nature of which cannot now be foreseen.

Whether courts should be able to enforce by injunction some or all provisions of labor contracts against employers, or against unions, or against both, is plainly a matter of policy. Legislatures have taken different views of that problem. The Pennsylvania legislature, for example, felt that courts should have that power and amended the state's anti-injunction act to authorize injunctions against breach of labor agreements.<sup>31</sup> Congress, on the other hand, deliberately refused to adopt a similar amendment. It faced the problem squarely in enacting the Labor Management Relations Act of 1947. In that Act it expressly excepted from the Norris-LaGuardia Act a limited class of cases—namely, proceedings by the National Labor Relations Board to enforce its orders preventing unfair labor practices (29 U.S.C. § 160 (h)), proceedings to enjoin certain illegal boycotts and strikes (29 U.S.C. § 160 (l)), proceedings by the Attorney General to enjoin strikes or lockouts imperiling the national

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<sup>31</sup>The Pennsylvania Labor Anti-Injunction Act, 1937, June 2, P.L. 1198, §§ 1 et seq., which was closely patterned after the Norris-LaGuardia Act, was held to bar injunctions against violations by employers of collective agreements. *Bulkins v. Sacks*, 31 Pa. D. & Co. R. 501 (1938); *Moreschi v. Mosteller*, 28 F. Supp. 613 (W.D. Pa. 1939). By an amendment in 1939, however, the legislature specifically excepted from the Act labor disputes "in disregard, breach, or violation of, a valid subsisting labor agreement" (1939, June 9, P. L. 302, § 1; Purdon's Penn Stat. Ann. Title 43, § 206d). In view of this amendment, the Pennsylvania courts now have jurisdiction to enjoin violations of collective bargaining agreements, including provisions for arbitration contained therein. *Philadelphia Marine Trade Assoc. v. International Longshoremen's Assoc., Local No. 1291*, 382 Pa. 326 (1955), cert. denied 350 U.S. 843 (1955).

safety (29 U.S.C. § 178 (b)) and proceedings to enjoin illegal payments to employee representatives (29 U.S.C. § 186 (e))—but it consciously refrained from lifting the prohibition of that Act as applied to actions to enforce collective bargaining agreements. A proposal to remove that prohibition was before it. Section 302 of the House Bill (which became § 301 of the Act), as reported and as passed by the House, expressly provided that in “actions and proceedings involving violations of agreements between an employer and a labor organization” the provisions of the Norris-LaGuardia Act “shall not have any application in respect of either party”. § 302 (e), H.R. 3020, 80th Cong. 1st Sess. (1947). The minority members of the House Committee which had reported the bill attacked this “effort of the bill to open up the Federal courts to petitions for injunction in disputes involving violations of union agreements despite the present provisions of the Norris-LaGuardia Act banning injunctions in labor disputes, except after full hearing and upon certain findings”, H.R. REP. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 110 (1947). The House bill as passed by the Senate eliminated this provision. The Senate version was adopted by the committee on conference<sup>32</sup> and enacted into law.

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<sup>32</sup> HOUSE CONF. REP. No. 510 on H.R. 3020, 80th Cong. 1st Sess., p. 66 (1947). In summarizing the results of the conference, Senator Taft reported to the Senate that the conference bill represented substantially the bill as passed by the Senate and that the conferees had “rejected the repeal of the Norris-LaGuardia Act” (93 CONG. REC. 6593, 6603 (1947)).

Thus, Congress, when confronted with the choice, was unwilling to pay the price of making the Norris-LaGuardia Act inapplicable in order to allow federal courts to enforce collective agreements. What Congress then refused to do, the court below has now done. Whatever justification may be found for judicial revision of statutes to accomplish a clear legislative purpose, certainly none can be found for judicial action contrary to what Congress itself did when it considered the particular question.

We have already referred to the inequality between unions and employers with respect to the enforcement of arbitration agreements created by the decision of the court below.—an inequality at variance with Congress' policy. Not only did the proponents of the original Norris-LaGuardia Act avow an intention to have the act apply mutually to labor and employers (See SEN. REP. No. 163, 72d Cong. 1st Sess. p. 9), but the chief object of Congress in 1947, in revising federal labor policy, was to remedy the inequities which had developed under the earlier law and to provide equality of treatment as between employees and employers. Pursuant to such objective Congress proscribed union as well as employer unfair labor practices. It compelled unions and employers alike to bargain in good faith, to refrain from discrimination or causing discrimination and to refrain from coercing employees in the exercise of guaranteed rights. Certainly it is beyond any reasonable speculation that Congress, having laboriously worked out a scheme of equal obligation, intended the inequitable result of allowing unions specifically to enforce employers' obligations by injunction, while employers remain helpless to obtain similar enforce-

ment of a no-strike clause, the chief, and often only inducement, to an employer to make a contract.

If it were left to Congress itself to authorize judicial enforcement of collective agreements, it could prevent such inequality by adopting a provision like that contained in the amendment to the Pennsylvania Labor Anti-Injunction Act, or that provided in Section 302 of the House Bill, H.R. 3020, 80th Cong., 1st Sess. (1947). But what has been accomplished, and all that can be accomplished, by amendment through judicial interpretation is a one-sided policy running contrary to the latest expression of Congressional intent.

### CONCLUSION

Whether arbitration of disputes under labor contracts should be compelled by judicial process involves considerations of labor policy which it is the business of the legislature to determine. Congress has spoken on this matter in three statutes—the United States Arbitration Act, the Norris-LaGuardia Act and the Labor Management Relations Act. Those three statutes must be read consistently and in the light of the continuing Congressional awareness of the problem of enforcing arbitration agreements. So read, they make it plain that Congress has not evidenced any intention to provide for judicial enforcement of labor arbitration. At the most, evidence of a desire to *encourage* voluntary compliance with arbitration agreements may be found, but not to provide for judicial *enforcement*.

Both the Arbitration Act and the Norris-LaGuardia Act were products of the same era. It was the same distrust on the part of unions of the equity powers of the federal courts that led, on the one hand, to labor's opposition to the Arbitration Act and, on the other,

to its drive for the Norris-LaGuardia Act. The exclusion from the former Act of labor contracts and the prohibition of the latter Act against judicial interference in labor disputes reflect the same Congressional purpose to keep the courts out of the field of labor controversies.

It may be said that views and policies toward labor arbitration have greatly changed since the date of these statutes. But when in 1947 Congress enacted the Labor Management Relations Act, it took a new, hard look at the whole problem and decided to leave matters just where they stood. Even today there is no general uniformity of opinion on the question whether labor arbitration agreements ought to be subject to judicial enforcement. Discussions of the proposed new Uniform Arbitration Act, for example, indicate differing views, even by labor spokesmen, as to the soundness of bringing courts and court techniques into the labor arbitration field. But in any event, the issue is one which only Congress can resolve and, if the policy of judicial enforcement is to be established, only Congress can devise the comprehensive and consistent scheme necessary to carry it out effectively.

The judgment of the court below should be reversed.

Respectfully submitted

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## APPENDIX

UNITED STATES ARBITRATION ACT, 43 Stat. 883, re-enacted  
 61 Stat. 669, 9 U.S.C. §§ 1-14, as amended by Act of  
 September 3, 1954, 68 Stat. 1233.

### *"Maritime transactions" and "commerce" defined; exceptions to operation of title*

SEC. 1. "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

### *Validity, Irrevocability, and Enforcement of Agreements to Arbitrate*

SEC. 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

### *Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination*

SEC. 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written

agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

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SEC. 8. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be

aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

**LABOR MANAGEMENT RELATIONS ACT, 1947, 61 STAT. 156  
29 U.S.C. § 185**

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of action and proceeding by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization. (1) in the district in which such organization maintains its principle office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

**NORRIS LA GUARDIA ACT, 47 STAT. 70, 29 U.S.C. §§ 101-115**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*  
 That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

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**SEC. 4.** No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
  - (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
  - (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
  - (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
  - (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.
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**SEC. 7.** No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect —

- (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;
- (b) That substantial and irreparable injury to complainant's property will follow;
- (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

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SEC. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are

employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or, when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs; or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

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# Supreme Court of the United States

OCTOBER TERM, 1956.

No. 276.

GENERAL ELECTRIC COMPANY,

PETITIONER.

LOCAL 205, UNITED ELECTRICAL, RADIO  
AND MACHINE WORKERS OF AMERICA (UE),

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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# Supreme Court of the United States

OCTOBER TERM, 1956.

No. 276.

GENERAL ELECTRIC COMPANY,  
PETITIONER,

v.  
LOCAL 205, UNITED ELECTRICAL, RADIO  
AND MACHINE WORKERS OF AMERICA (UE),  
RESPONDENT.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

BRIEF FOR RESPONDENT IN OPPOSITION

---

Opinions Below

The opinion of the Court of Appeals (R. 31-58) is reported in 233 F.2d 85. The opinion of the District Court (R. 22-27) is reported in 129 F. Supp. 665.

## Jurisdiction

The judgment of the Court of Appeals, remanding the case for further proceedings under the Arbitration Act, and directing the District Court to permit the parties to amend their pleadings to allege, respectively, compliance with the requisites of the Act and defenses afforded by it and to determine certain preliminary questions as to arbitrability, was entered on April 25, 1956 (R. 58). The jurisdiction of this Court is invoked under 28 USC Sec. 1254.

## Questions Presented

Since the only controversy actually decided by the Court below relates to the Norris-LaGuardia Act, the only justiciable issue presented by this case relates to the applicability of that Act.

The question thus actually presented is whether the Norris-LaGuardia Act deprives a federal district court of jurisdiction to enforce an employer's obligation in a collective contract to submit to arbitration two grievances: one, that an employee was being paid at a lower rate of pay than that specified in his job classification; the other, that an employee had been discharged arbitrarily and not for cause.

The questions raised by the petitioner with respect to the Labor Management Relations Act and the Arbitration Act concern the law, as formulated by the Court below, to be applied by the District Court, upon remand, after the pleadings have been amended by the parties and after the District Court determines the question of whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them for decision by the Court and other preliminary matters relating to arbitrability. Since the Court below has made these conditions prerequisites for the application

of the Arbitration Act by the District Court and neither the amendments nor the determination by the District Court has yet been made, no real question as to the Labor Management Relations Act of 1947 or the Arbitration Act can now be presented and petitioner's formulation of the question in these respects (Petitioner's Brief p. 2, Question 1) relates to a hypothetical case that may never arise; or a case that may arise in such a different form that the question presented is moot and abstract.

### **Statutes Involved**

The pertinent provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 USC Secs. 101-115) in addition to Secs. 1 and 7 set forth by the Petitioner in Appendix A to its Brief, are set forth in Appendix A hereto. The provisions of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. Secs. 141-187) and of the United States Arbitration Act (61 Stat. 669, 9 U.S.C. Secs. 1-14 as amended), which petitioner claims, and respondent denies are pertinent to the consideration of this case by this Court, are set forth in Petitioner's Brief, Appendix A.

### **Statement**

Petitioner is a New York corporation, having a plant at Ashland, Massachusetts which is, without dispute, in an industry affecting commerce.

Respondent is a voluntary unincorporated local labor union, with its principal place of business in Ashland, Massachusetts, all of whose members are citizens of states other than New York (Appendix B. hereto, Carr Affidavit p. 23). It has been certified by the National Labor Relations Board and is recognized by the petitioner as the representa-

tive for the purpose of collective bargaining of the employees at petitioner's Ashland plant.

The collective bargaining agreement between the parties, which was in full force and effect at all times relevant hereto, established a conventional four step procedure for the settlement of employee grievances and further provided that "any matter involving the application or interpretation of any provisions of this Agreement" with certain exceptions not here material, "may be submitted to arbitration by either the Union or the Company," by written notice given after the decision in the fourth step of the grievance procedure (R. 13-15, Agreement Exhibit A, Arts. XII, XIII, R. 8).

On April 2, 1954, the Union duly filed a written grievance that employee Boardi was being employed at a job classification which carried a higher rate of pay than he was in fact receiving (R. 15), and on August 13, 1954 a second grievance that employee Armstrong had been discharged arbitrarily and not for cause. (R. 17) After unsuccessfully prosecuting these grievances through the fourth step of the grievance procedure, the Union duly notified the company in each instance of its desire to arbitrate, but the company refused to submit to arbitration either the grievance or the question of its arbitrability (R. 16, 17).

The union then filed its complaint in the District Court, alleging in its amended complaint that the action arose under Sections 301(a)-(c) of the Labor Management Relations Act of 1947 and praying that the company be required specifically to perform its agreement to arbitrate these grievances, in accordance with the contract and for damages (R. 13-18). The Company moved to strike that portion of the prayer for relief asking that it be compelled to arbitrate these grievances on the ground that the Court had no jurisdiction to grant the remedy of specific performance (R. 18-19). The District Court granted the mo-

tion for want of jurisdiction (R. 27-28) and on the sole ground that "the plain language of Norris-LaGuardia forbids the issuance of an injunction" (R. 25, 33, Petition p. 4). The Union then amended its complaint to eliminate any prayer for damages, so that no question could be raised as to the appealability of the decision (R. 28, 33) and, for the purpose of asserting diversity jurisdiction, added allegations that the matter in controversy exceeds the sum of three thousand dollars exclusive of interests and costs, that it had no adequate remedy at law, and that it would be subject to irreparable injury unless granted the relief requested. As thus amended, the amended complaint requested only specific performance of the agreement to arbitrate and such other and further relief as the Court deems proper (R. 28). This motion was allowed, and the District Court, expressly in accordance with its earlier ruling that it lacked jurisdiction because of the Norris-LaGuardia Act, entered final judgment dismissing the action for want of jurisdiction (R. 29).

On January 31, 1956, while the case was on appeal, and after the decision of this Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (Jan. 16, 1956), respondent filed a motion under 28 U.S.C. Sec. 1653, with supporting affidavit, to allege that all the employee members of or employees represented by the Union are citizens of states other than the state of New York, where petitioner is incorporated, and that the Court had additional jurisdiction by virtue of Title 28 U.S.C. Sec. 1332(a)(1). (Appendix B hereto) The affidavit was uncontroverted.

On appeal the Court below vacated the judgment of the District Court and remanded the case (R. 58). It held that "jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act" (R. 35) and that "an order to compel arbitration is neither barred specifically by Sec. 4 nor subject to the requirements of Sec. 7 (of the Norris-

LaGuardia Act)'. (R. 40) As an apt summary of its analysis the Court quoted from *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953) "The general structure, detailed provisions, declared purposes and legislative history of that statute (Norris-LaGuardia Act) show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made" (R. 40).

Having thus decided, contrary to the District Court, the only matter upon which the District Court based its final judgment, namely that the Norris-LaGuardia Act does not negative the existence of jurisdiction, the Court below proceeded to a discussion of the affirmative basis upon which respondent might prevail "in the end" (R. 42), upon remand.

As prerequisites, it set forth three conditions: the parties should amend their pleadings to allege respectively compliance with the requisites of the Arbitration Act and defenses afforded by it; the District Court should decide as a matter of the general law of contract interpretation whether the contract in suit puts matters of arbitrability to the arbitrator or leaves them to decision by the Court; and if the former, the District Court should decide whether the matter is arbitrable, but if the latter, whether the claim of arbitrability is frivolous or patently baseless. Once these conditions have been met, the Court below held that the District Court could give the relief requested, under Sections 3 and 4 of the Arbitration Act, if the decision as to arbitrability on remand was for the Court, or subject to Sections 10 and 11 of that Act, if the decision as to arbitrability on remand was for the arbitrator (R. 56-57) and assuming, in each case, the respective decisions favoring arbitrability.

In its discussion of the applicable law, the Court limited

itself to a discussion of the case as a "Sec. 301 case" (R. 42-43) in which jurisdiction is based, not on diversity of citizenship but on federal question jurisdiction under Article III of the Constitution. In such a case, it held the availability of specific performance is a matter not of right but of remedy and governed by the law of the forum (R. 43); the special demands of diversity jurisdiction in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co. v. York*, 326 U.S. 69 (1945) and *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) do not require the application of state law governing the forms and mode of enforcing an arbitration agreement (R. 44); a statutory basis is required to give effect to arbitration agreements, and although Sec. 301 does not provide a sufficiently firm such basis, (R. 46-48), the Arbitration Act does. (R. 48) It further held that the arbitration clause here in suit is within the meaning of Sec. 2 of that Act as a "contract evidencing a transaction involving commerce" and not excluded from the operation of the Act by Sec. 1 thereof as a "contract of employment" of "workers engaged in foreign or interstate commerce" and that "the test of Sec. 4" of that Act, making specific enforcement available as a remedy, "will be satisfied by a complaint which meets the terms of Sec. 301 itself" (R. 56). Accordingly, it vacated the judgment of the District Court and remanded the case for further proceedings, including the amendment of the pleadings by the parties and decisions on arbitrability by the District Court. It also denied the respondent's motion to amend the complaint to show diversity jurisdiction on the ground that it may have become moot and in any event because, under Rule 17(b) F.R.C.P., it could not accomplish the result intended (R. 58).

## Argument

It is clear that the only controversy actually decided by the Court below was that the Norris-LaGuardia Act did not negative the existence of jurisdiction in the District Court to compel the enforcement of the petitioner's obligation to submit the Boiardi and Armstrong grievances to arbitration in accordance with the terms of the collective bargaining agreement, and that the District Court erred in holding to the contrary. This was the only issue decided by the District Court, and, in the light of the conditions of the remand by the Court below, the only case or controversy on which the judicial power is capable of acting in the present posture of the case. *Osborne v. Bank of United States*, 9 Wheat 738, 819-6 L.ed. 204; *Smith v. Adams*, 130 U.S. 167, 173-174.

This decision with respect to the non-applicability of the Norris-LaGuardia Act does not warrant review by this Court.

### I. THERE IS NO CONFLICT OF DECISION WITH RESPECT TO THE NORRIS-LA GUARDIA ACT.

There is no conflict of decision among the courts of appeal on this issue and petitioner has neither asserted any nor cited any conflicting decision by any court of appeals. On the contrary, the decisions of the Courts of Appeals for the Third, Fifth and Sixth Circuits are in accord with the decision on this issue of the Court below. *Independent Petroleum Workers v. Esso Standard Oil Co.*, CA 3d, decided June 26, 1956; *Lincoln Mills of Ala. v. Textile Workers Union*, C.A. 5th, 230 F.2d 81, 84, and 84-5 ftn. 6 (1956); *Milk and Ice Cream Drivers v. Gillespie Milk Products Corp.*, C.A. 6th 203 F.2d 650 (1953). The decisions of the Court of Appeals for the Fourth Circuit in *Amazon Cotton*

*Mill Co. v. Textile Workers Union*, 167 F.2d 183 (1948), the Ninth Circuit in *California Ass'n. of Employers v. Building and Construction Trades Council*, 178 F.2d 175 (1949) and the Tenth Circuit in *Lee Way Motor Freight Inc. v. Keystone Freight Lines Inc.*, 126 F.2d 931 (1942) are cited by petitioner not as decisions in conflict with the decision of the Court below, but only on the question of the requirements of Sec. 7 of the Act, and, in any event, they do not disclose any conflict. The *Amazon* case held that the Labor Management Relations Act of 1947 did not give the District Court jurisdiction over a complaint charging unfair labor practices and seeking an injunction to compel bargaining and an award of damages. The *California Ass'n.* case held to the same effect that the District Court lacked jurisdiction over a complaint seeking a declaratory judgment as to certain unfair labor practices and injunctive relief pending the declaration, since such matters were within the exclusive primary jurisdiction of the National Labor Relations Board. Its references to the interdictions of the Norris-LaGuardia Act are not necessary to the decision and in any event are couched in terms of secondary boycotts and similar labor disputes and bear no relation to a request for a decree compelling performance of a contract obligation to arbitrate grievances. The *Lee Way Motor Freight* case held that the Norris-LaGuardia Act prohibited an injunction sought by one common carrier against another where a labor dispute, originating between the plaintiff and certain unions, involving a strike and picketing, was projected into the relationship between defendant and its employees and could be avoided only by settlement of the conflict between plaintiff and the unions or by defendants terminating their traffic relations with the plaintiff. None of these cases purports to decide the question of the applicability of the Norris-LaGuardia Act to the circumstances of this case or the relief here sought and

none is in conflict with the decision of the Court below, or the decisions of the Third, Fifth and Sixth Circuits cited above on this question.

Petitioner's claim that the Court below misinterpreted this Court's decision in *Syres v. Oil Workers Union*, 350 U.S. 892 (1955) is equally unfounded. The *per curiam* opinion of this Court cites *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192, *Tunstall v. Brotherhood*, 323 U.S. 210 and *Railroad Trainmen v. Howard*, 343 U.S. 768, cases which hold that the District Court has jurisdiction to issue injunctive relief notwithstanding the provisions of the Norris-LaGuardia Act, in circumstances similar in principle to those here involved. Since the *Syres* case involved employees subject to the Labor Management Relations Act, this Court's *per curiam* opinion indicates that the *Steele*, *Tunstall* and *Howard* cases do not rest upon any special terms or history of the Railway Labor Act. See *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1936); *Graham v. Brotherhood of Firemen*, 338 U.S. 232 (1949).

## II. THERE IS NO IMPORTANT FEDERAL QUESTION REQUIRING DECISION BY THIS COURT WITH RESPECT TO THE NORRIS-LA GUARDIA ACT.

As noted, the decisions of the First, Third, Fifth and Sixth Circuit are in accord with respect to the non-applicability of the Norris-LaGuardia Act in the circumstances of this case and there is no decision of any Court of Appeals in conflict with these decisions. Moreover, this Court has held in a long and consistent line of cases that the Norris-LaGuardia Act does not deprive district courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act or deprive employees of equitable relief from illegal discriminatory representation or preclude man-

datory injunctions of the kind here sought. *Virginian Ry. Co. v. System Federation* No. 40, 300 U.S. 515; *Graham v. Brotherhood of Firemen*, 338 U.S. 232; *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192; *Tunstal v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Railroad Trainmen v. Howard*, 343 U.S. 768. The *per curiam* opinion of this Court in the *Syres* case, *supra*, granting the petition for certiorari, reversing the judgment of the Court of Appeals in that case and remanding the case to the District Court is an indication that the question of the non-applicability of the Norris-LaGuardia Act to mandatory injunctions of the kind here sought does not warrant review by this Court.

### III. THE DECISION BELOW IS CLEARLY CORRECT WITH RESPECT TO THE NORRIS-LA GUARDIA ACT.

Petitioner does not seek to show that the decision of the Court below is incorrect except by citing earlier district court cases which are asserted to be in conflict with it, by claiming a misinterpretation of the *Syres* case, *supra*, and by alleging that the decision carves out a single term of the contract—that relating to arbitration—as exempt from arbitration. The latter point is not supported by the decision (See R. 39) and is in any event not an argument as to the incorrectness of the decision.

The decision is based on a careful and sound construction of the statute. For the legislative history, see the George Amendment 75 Cong. Rec. Pt. V 4772-4773. 72nd Cong. 1st Session Sen. Doc. No. 71. Conf. Rep. March 14, 1932; H. Rep. No. 793. Conf. Rep. March 14, 1932; H. Rep. No. 821, Conf. Rep. March 16, 1932; 75 Cong. Rec. pp. 5549-50, 6336-7; Witte "The Federal Anti-Injunction Act" 16 Minn. Law Review 638; and the Senate debate on the Railway Clerks case 75 Cong. Rec. Pt. 4, pp. 4936-9. Petitioner

nowhere controverts the Court's interpretation of the text of the statute as warranting the granting of the relief here sought (See R. 37) or the support which it finds in the legislative purpose and policy as declared in the Act to encourage the development of free collective bargaining (R. 39) or its interpretation of the injunction at which the Act was directed as the traditional labor injunction, (See H. Rep. No. 669, 72nd Cong., 1st session, p. 3, 8; *United States v. Hutcheson*, 312 U.S. 219) rather than an order to compel arbitration of an existing dispute under a collective bargaining agreement. (R. 36) Petitioner's arguments do not reach the basic issue and provide no ground for rejecting the decision of the Court below. It is manifestly correct.

#### IV. THE QUESTIONS RAISED BY PETITIONER WITH RESPECT TO THE LABOR MANAGEMENT RELATIONS ACT AND THE ARBITRATION ACT RELATE TO A HYPOTHETICAL AND ABSTRACT CASE AND ARE NOT APPROPRIATE FOR ADJUDICATION BY THIS COURT.

Petitioner's main reliance is on the asserted conflict between the decision of the Court below and the decisions of other courts of appeals and of this Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, with respect to the interpretation of the Arbitration Act, and a similar asserted conflict with the decisions in other courts of appeals and the decision of this Court in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, with respect to the interpretation of Section 301 of the Labor Management Relations Act (Petition 6-12). There is concededly an irreconcilable conflict of opinion among the courts of appeals on the question of the interpretation of the former, and many difficult and unresolved questions relating to the interpretation of the latter Act. But this case does not raise any such questions in the form of a case or controversy or in an appropriate manner for the ex-

ercise of the judicial power. The only actual case decided by the Court below relates to the non-applicability of the Norris-LaGuardia Act. Its discussion of the affirmative basis for obtaining the relief sought in the Labor Management Relations Act and the Arbitration Act is not the resolution of an actual controversy, but an abstract discussion of law. It is, in effect, guidance to the parties and to the District Court as to the law to be applied upon remand, when and if the parties amend their pleadings to show compliance with the requirements of the Arbitration Act and defenses afforded by it, when and if the District Court decides that the question of arbitrability is either for its determination or that of the arbitrator, and when and if either the District Court or the arbitrator decides that the grievances alleged are arbitrable under the provisions of the contract in suit. Moreover, the discussion of the Court below as to the applicable law proceeds on the assumption that the case now involves, and will continue to involve only federal jurisdiction and not jurisdiction based on diversity of citizenship.

But these conditions or assumptions as to the posture of the case on remand may never be met or may be met in a form which will bring the case for actual adjudication under entirely different circumstances. For example, although the Court below denied respondent's motion to amend its complaint to show diversity jurisdiction by showing, with supporting affidavit, not only that the local union was diverse in citizenship from petitioner, but that all its members were also diverse, (R. 57-58) it held in a later case, on precisely the same allegations, that there was both diversity and federal jurisdiction. *United Electrical Radio and Machine Workers of America (UE) Amalgamated Local 259 v. Worthington Corporation*, C.A. 1, July 31, 1956. ("Thus on the record before us, taking into account the allegations as to citizenship of the individual plaintiffs and of the members of the plaintiff union, it seems that there is diversity

jurisdiction as to all parties and also federal jurisdiction under Section 301 of the Taft-Hartley Act as to plaintiff Union alone"). See *Thomas v. Board of Trustees of the Ohio State University* (1904) ~~195 U.S.~~ 207; 29 U.S.C. Sec. 185(b). Even if this later decision does not indicate a retreat by the Court below from its position in the instant case, there is nothing to prevent respondent upon remand from further amending its complaint to bring a representative class suit, which would thereby raise the issue of diversity jurisdiction which the Court below upheld in the *Worthington* case, *supra*. In either event, if diversity jurisdiction is made to appear in the case, after remand, the decision as to the interpretation of federal law might well assume an entirely different aspect and render the Court's present discussion of the problem moot and abstract. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198; Mass. G.L. (Ter. Ed.) C. 150 § 11, C. 251 § 14 et seq.; *Maglizzzi v. Handschumacher*, 327 Mass. 569; *Sanford v. Boston Edison*, 316 Mass. 631; *Post Publishing Co. v. Cort*, 134 N.E. 2d 431 Mass. (1956). Again, until petitioner and respondent amend their pleadings, to show compliance with and defenses under the Arbitration Act, it is not possible to know whether the issues raised, after remand, will be what the Court below assumes, or whether the case will go off on a tangent not foreseen. In any event, the decision of the Court below at this stage of the proceedings ought not to foreclose a review of the decision of the District Court as to the interpretation of federal law after the pleadings have been amended, upon remand, and the issues raised on an appeal. *Copra v. Surō*, C.A. 1, July 6, 1956. Furthermore, it is conceivable that the District Court or the arbitrator, as the case may be, on remand, may decide, as a matter of general contract law that under the contract in suit, there is no arbitrable issue, and such a decision would present a different issue, in the further litigation of the case, from those involving

the interpretation of federal law which petitioner presents in its petition.

Under any or all of these or other similar circumstances, the reasons which petitioner advances for granting the writ based on conflicts between the decision of the Court below and of other Courts of Appeals and of this Court with respect to the Arbitration Act and the Labor Management Relations Act involve hypothetical, unreal, moot, non-final and abstract questions and an interlocutory decision. As we have shown, these questions may never arise or may be litigated in a form, after remand, which will not even remotely resemble the questions to which the Court below addressed itself in its discussion of the affirmative basis in federal law upon which petitioner might "in the end" obtain the relief requested. Since this Court does not pass upon controversies or cases which are not actual nor sit to pass upon questions of law *in thesi* (See *Marye v. Parsons*, 114 U.S. 325, 330; *New Jersey v. Sargent*, 269 U.S. 328, 333), there is no warrant for granting the review petitioner seeks. See concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346; *Peters v. Hobby*, 349 U.S. 331, 338.

Petitioner seeks to overcome this bar to the grant of its petition by claiming that "the Court's ruling as to the enforceability of the arbitration provision is 'fundamental to the further conduct of the case'. Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Land v. Dollar*, 330 U.S. 731, 734 (1947)." (Petition p. 5, fn. 2). Neither case is apposite. Both involved clear cut issues of law which would otherwise qualify as a basis for certiorari despite their interlocutory status. The present case is not merely in an interlocutory status, but involves so many variables, hypothetical questions and further possibilities beyond those discussed by the Court below that the Court's

ruling may have little or nothing to do with the further conduct of the case. The case is not ripe for adjudication.

### **Conclusion**

For the foregoing reasons, it is respectfully submitted, this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALLAN R. ROSENBERG

*Counsel for Respondent.*

## Appendix A

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. Secs. 101-115

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

Sec. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

- (a) Either party to such contractor agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or
- (b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

Sec. 6. No officer or member of any association or organization and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participating in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 13. When used in this Act, and for the purposes of this Act—

- (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization or employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or association of employers; or (3) between one or more employees or associations of employees and one

or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

**Appendix B****MOTION TO AMEND COMPLAINT TO SHOW  
JURISDICTION.**

Plaintiff Appellant moves to amend the Amended Complaint for Specific Performance of Contract to Arbitrate and for Damages herein by adding as the last sentence of paragraph one of Count I thereof: (R.13)

"All of the employee members of, or employees represented by plaintiff Union are citizens of Massachusetts, Rhode Island or New Hampshire, none are citizens of New York",

and as the last sentence of paragraph three of Count I thereof: (R. 13)

"This Count also has jurisdiction by virtue of Title 28, U.S.C. 1332(a)(1)."

By its attorney,

(s) ALLAN R. ROSENBERG

**AFFIDAVIT IN SUPPORT OF APPELLANT'S  
MOTION TO AMEND COMPLAINT TO SHOW  
JURISDICTION.**

Commonwealth of Massachusetts

Suffolk: ss

Charles R. Carr, being duly sworn, deposes and says:

My name is Charles R. Carr. I live at 16 Curve Street, Millis, Massachusetts. I am employed at the plant of appellee, General Electric Company, Telechron Department, at Ashland, Massachusetts, and have been so employed for the past seventeen years, except for four years' service in the armed forces. I am and have been for the past two years Business Agent of Local 205, United Electrical, Radio and Machine Workers of America (UE), appellant herein. I make this affidavit in support of appellant's motion to amend complaint to show jurisdiction.

Based on my own personal knowledge and an examination of the records of appellant Union, I depose and say that all the employees who are members of or represented by appellant Union are and were at the time of commencement of suit herein, citizens of the Commonwealth of Massachusetts, the State of Rhode Island, or the State of New Hampshire, and none of them were at the time of commencement of suit herein or are now, citizens of the State of New York.

(s) CHARLES R. CARR

Commonwealth of Massachusetts, Suffolk: ss

Subscribed and sworn to before me, this thirty-first day of January, 1956.

(s) C. BERTRAM CRAWFORD

*Notary Public*

My commission expires:

April 2, 1959

## ORDER OF COURT.

April 25, 1956

It is ordered that motion of appellant to amend complaint to show jurisdiction be, and the same hereby is, denied.

By the Court:

(s) ROGER A. STINCHFIELD

*Clerk.*

## CLERK'S CERTIFICATE.

I, Dana H. Gallup, Chief Deputy Clerk of the United States Court of Appeals for the First Circuit, and during the temporary absence of the Clerk, in charge of the affairs of said clerk's office of said Court and custodian of its files and records, certify that the foregoing two pages contain and are a true copy of (1) Motion to Amend Complaint to Show Jurisdiction with Affidavit in support thereof filed January 31, 1956, and (2) Order of April 25, 1956, denying said motion in the cause in said Court numbered and entitled 4980, Local 205, United Electrical, Radio and Machine Workers of America (UE), plaintiff, appellant, versus General Electric Company, (Telechron Department, Ashland, Massachusetts), defendant, appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this second day of August, A.D. 1956.

[SEAL]

(s) DANA H. GALLUP

*Chief Deputy Clerk.*

Office Supreme Court U.S.  
FILED

FEB 1 1957

JOHN T. PEY, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 276

GENERAL ELECTRIC COMPANY,  
PETITIONER,

v.

LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (UE),  
RESPONDENT.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

ALLAN R. ROSENBERG  
Attorney for the Respondent

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# Supreme Court of the United States

OCTOBER TERM, 1956

No. 276

GENERAL ELECTRIC COMPANY,  
PETITIONER,

LOCAL 205, UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA (UE),  
RESPONDENT.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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BRIEF FOR THE RESPONDENT

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## Statutes Involved

In addition to the statutes cited by Petitioner (Br. p. 2) there are also involved Mass. G. L. (Ter. Ed.) c. 150, Section 11:

*"Collective Bargaining Agreements Relating to Arbitration, etc.; Validity, Finality, etc.—All provisions*

of collective bargaining agreements relating to arbitration and conciliation before public or private arbitration and conciliation tribunals shall be valid, and if the parties to such agreements agree that the determination of the tribunal on any issue shall be final, such determination shall be deemed final and shall be enforceable by proper judicial proceedings. (1949, 548, app'd. July 13, 1949; effective 90 days thereafter.)"

and Mass. G. L. (Ter. Ed.) c. 251, Section 14:

*"Arbitration between Parties to Contracts.*—The parties to a contract may agree in writing that any contract hereafter arising under the contract which might be the subject of a personal action at law or of a suit in equity shall be submitted to the decision of one or more arbitrators (1925, 294, § 5)."

### Questions Presented

1. Whether the Norris La Guardia Act is applicable to deprive a federal district court of jurisdiction to compel specific performance of an agreement, in a collective bargaining contract between a union and an employer, to arbitrate grievances of individual employees arising out of alleged violations of that contract.
2. Whether Section 301(a) of the Labor Management Relations Act of 1947 confers jurisdiction on a federal district court over a suit for violation of an agreement in a collective bargaining contract between a manufacturing company and a union in an industry affecting commerce, to arbitrate grievances of individual employees arising out of alleged violations of that contract, where the agreement to arbitrate is a promise which runs to the union alone, and

which the individual employees could not equally enforce in a personal cause of action; and, if so, whether Section 301, construed in the light of its legislative history, grants to the district court authority from Section 301 itself, authority to use its inherent equity power, or authority to employ any law, including state law, to compel specific performance of the agreement to arbitrate.

3. Whether, in a suit, in which jurisdiction is based on Section 301(a) of the Labor Management Relations Act of 1947, a federal district court has jurisdiction and is authorized by Section 4 or Section 2 of the United States Arbitration Act to compel specific performance of an agreement, in a collective bargaining contract between a manufacturing company and the union which represents its production and maintenance employees in an industry affecting commerce, to arbitrate grievances of individual employees arising out of alleged violations of that contract. This question, in turn, depends upon (1) whether a collective bargaining agreement between an employer and a union in a manufacturing industry in commerce is "a contract evidencing a transaction involving commerce" under Section 2 of the Arbitration Act; (2) whether such a contract is excluded from the operation of that Act as "a contract of employment" under Section 1 of the Act; and whether production and maintenance employees in a manufacturing industry affecting commerce are within the definition of "seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce", under Section 1 of the Act.

4. Whether in a suit for violation of an agreement to arbitrate in a collective bargaining contract, in an industry affecting commerce, where the union as an entity and all its members are diverse in citizenship from the employer

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and jurisdiction is asserted under Title 28 U.S.C. Section 1332 (a) (1), a federal district court is authorized by Massachusetts law to compel specific performance of the agreement to arbitrate; and whether in such a suit by the union under Section 301 (a) and 301 (b) of the Labor Management Relations Act of 1947, the union is entitled to sue as an entity under the second clause of Rule 17(b) of the Rules of Federal Procedure, or by that clause as extended by Section 301(b) of the Labor Management Relations Act of 1947, without regard to Massachusetts law, which does not permit a suit by a union as entity.

### **Statement of Case**

Petitioner is a New York corporation, having a plant at Ashland, Massachusetts which is, without dispute, in an industry affecting commerce.

Respondent is a voluntary unincorporated local labor union, with its principal place of business in Ashland, Massachusetts, all of whose members are citizens of states other than New York (R. 57-58). It has been certified by the National Labor Relations Board and is recognized by the petitioner as the representative for the purpose of collective bargaining of the employees at petitioner's Ashland plant.

The collective bargaining agreement between the parties, which was in full force and effect at all times relevant hereto, established a conventional four step procedure for the settlement of employee grievances. It contained a provision requiring the Company to furnish the Union a complete list of job classifications and rate ranges (Article IX, R. 24) and a "dismissal for cause" clause (Article XII, R. 25). It further provided that "any matter involving the application of interpretation of any provisions of this Agreement" with certain exceptions not here material;

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"may be submitted to arbitration by either the Union or the Company," by written notice given after the decision in the fourth step of the grievance procedure (Article XII, R. 31-33). The agreement also contained a no-strike, no lock out clause (Article XIII, R. 34).

On April 2, 1954, the Union duly filed a written grievance that employee Boiardi was being employed at a job classification which carried a higher rate of pay than he was in fact receiving and on August 13, 1954, a second grievance that employee Armstrong had been discharged arbitrarily and not for cause. After unsuccessfully prosecuting these grievances through the fourth step of the grievance procedure, the Union duly notified the company in each instance of its desire to arbitrate, but the company refused to submit to arbitration either the grievance or the question of its arbitrability.

The union then filed its complaint in the District Court, alleging in its amended complaint that the Company had violated its agreement to arbitrate under Article XIII of the agreement, with respect to the Boiardi and Armstrong grievances, referring to Articles IX and XII of the agreement; that the action arose under Sections 301(a), (b) and (c) of the Labor Management Relations Act of 1947 and praying that the company be required specifically to perform its agreement to arbitrate these grievances, in accordance with the contract and for damages. The Company moved to strike that portion of the prayer for relief asking that it be compelled to arbitrate these grievances on the ground that the Court had no jurisdiction to grant the remedy of specific performance. The District Court granted the motion for want of jurisdiction (R. 55) on the sole ground that "the plain language of Norris La Guardia forbids the issuance of an injunction" (R. 53). The Union then amended its complaint to eliminate any prayer for damages, so that no question could be raised as to the

appealability of the decision (R. 55-56, 54-55) and, for the purpose of asserting diversity jurisdiction, added allegations that the matter in controversy exceeds the sum of three thousand dollars exclusive of interests and costs, that it had no adequate remedy at law, and that it would be subject to irreparable injury unless granted the relief requested. As thus amended, the amended complaint requested only specific performance of the agreement to arbitrate and such other and further relief as the Court deems proper (R. 55). This motion was allowed, and the District Court, expressly in accordance with its earlier ruling that it lacked jurisdiction because of the Norris LaGuardia Act, entered final judgment dismissing the action for want of jurisdiction (R. 56).

On January 31, 1956, while the case was on appeal, and after the decision of this Court in *Bernhardt v. Polygraphic Co.*, 340 U.S. 198 (Jan. 16, 1956), respondent filed a motion under 28 U. S. C. Sec. 1653, with supporting affidavit, to allege that all the employee members of or employees represented by the Union are citizens of states other than the state of New York, where petitioner is incorporated, and that the Court had additional jurisdiction by virtue of Title 28 U. S. C. Sec. 1332(a)(1). (R. 57-58) The affidavit was uncontested.

On appeal, the Court below reversed (R. 82-83). It held that the Norris La Guardia Act was not applicable to a suit for specific performance of an agreement to arbitrate in the collective bargaining contract herein. With respect to the affirmative basis for granting such relief, it held that in action under Section 301 (a) of the Labor Management Relations Act, the availability of the remedy of specific performance was to be determined by federal, not state law; that Section 301 does not provide a sufficiently firm statutory basis for such enforcement; that the United States Arbitration Act provides an integrated system for

compelling arbitration; that the collective bargaining agreement herein is a contract evidencing a transaction involving commerce, within the meaning of Section 2 of that Act, and was not excluded from the operation of that Act, by Section 1 of the Act as a "contract of employment" of "workers engaged in foreign or interstate commerce"; and that the remedy of specific performance was available under Section 4 of the Act. Accordingly it vacated the judgment of the District Court and remanded the case for further proceedings (R. 82-83). It also denied plaintiff's motion to amend the complaint to show diversity jurisdiction on the ground that it may have become moot and in any event because, under Rule 17(b) F. R. C. P. it could not accomplish the result intended (R. 82).

### Summary of Argument

I. The Court below correctly held that the general structure, detailed provisions, declared purpose and legislative history of the Norris La Guardia Act show that it has no application to the suit herein to compel specific performance on an agreement to arbitrate, in a collective bargaining contract voluntarily made. Petitioner's argument that the Court's interpretation permits unions to compel specific performance of arbitration clauses, free of the prohibitions of the Norris La Guardia Act, but forbids employers to obtain injunctions against picketing without compliance with the Act, is answered by the Court's opinion which holds the Act equally applicable to both union and employer, with respect to conduct which the Act makes absolutely or conditionally non-enjoinable. Petitioner's argument that the Court has in effect made an *ad hoc* exception to Section 7 of the Act for orders to compel arbitration mistakes the nature of the Court's holding, which is that such orders are not subject to any prohibitions of the Act.

Petitioner's citation of earlier cases which, it asserts, held the Act to apply to non-coercive conduct such as breaches of contract do not support petitioner's claim and are irrelevant since there is no conflict among the Courts of Appeal with respect to the issue decided by the Court below, whose decision is in accord with decisions of the Third, Fifth, and Sixth Circuits. Petitioner's attempt to distinguish decisions of this Court which held that the Act is not applicable to prevent equitable relief against racial discrimination, even though a labor dispute was involved, is without justification in those decisions. Nor can any support be derived, as petitioner asserts, from the refusal of Congress to repeal the Norris La Guardia Act, when it enacted Section 301 of the Labor Management Relations Act of 1947, since the prohibitions of the former Act are not coextensive with the relief that may be granted, in private suits under Section 301, of the latter Act. The wisdom of making clauses other than agreements to arbitrate in collective bargaining contracts valid, binding and enforceable, and therefore opening up the field of labor contracts generally to policing by the courts, to which petitioner objects, is not a reason for refusing relief where it is warranted, and, in any event, it was the intent of Congress to make such contracts valid, binding and enforceable on both parties. Petitioner's argument that the holding of the Court below results in an inequality of treatment between employers and unions, which is at variance with Congressional policy, is not supported by the decision below, and such "practical grounds" as it asserts are themselves at variance with Congressional policy.

Although the Court below declined to rest its holding on the label applied to the order to compel specific performance, there is strong separate support in the George amendment and elsewhere in the legislative history, the text,

and the decisions of this Court for holding that the Act does not apply to a mandatory injunction which does not trench upon its interdictions.

II. The Court below held that although Section 301 conferred jurisdiction over the controversy here, under *Association of Employees v. Westinghouse Co.*, 348 U.S. 43 (1955), because there was a breach of a promise which only the unions could enforce and not a personal right of the employees to individual benefits, and although federal, not state law governed, Section 301 was not a sufficient statutory basis on which to ground a decree for specific performance of the agreement to arbitrate herein.

Despite the petitioner's claim that the rights involved in the arbitration are personal to the employees concerned, the court's holding on jurisdiction is amply warranted in the record. The collective bargaining contract shows that the Union and the Company are the only parties to the arbitration clause and that individual employees are excluded from its operation. Petitioner's insistence that Section 301 authorizes only actions for damages is misguided. The legislative history and policy of the Act, which is analyzed in detail, sufficiently demonstrate the intent on the part of Congress that both legal and equitable relief, including specific performance of agreements to arbitrate, should be available under Section 301.

The common law rule that contracts to arbitrate future disputes are not specifically enforceable is not a "fundamental principle of contract law", as petitioner contends, nor a sufficient reason to refuse to invoke Section 301 to compel specific performance of the agreement to arbitrate herein, as the Court below thought. The common rule is mortmain in an era when the encouragement of arbitration in labor relations matters is a consistent national policy, fostered by governmental agencies and the courts, and

arbitration clauses are in widespread use in modern collective bargaining contracts, and serve a useful purpose in settlement of labor disputes that might otherwise erupt in industrial strife.

The lack of a detailed procedure in the statute is not fatal to its use. The federal district courts, as courts of equity, have inherent power to adapt their remedies to make effective and safeguard arbitration agreements; and the parties themselves, through the Federal and state mediation boards, the American Arbitration Association and other private tribunals, have adequate facilities at their disposal to make arbitration effective. Moreover, many of the legalistic features of commercial arbitration are unnecessary in labor arbitration, and the lack of such procedures in Section 301 is an insufficient warrant to deny its use.

Even if Section 301 does not in its own terms authorize specific enforcement or authorize the federal district courts to employ their inherent equity powers to that end, Congress has in Section 301 conferred on the District Courts a protective jurisdiction, in the exercise of which it may apply any law, including State law, to protect the federal labor policy. Under Massachusetts law, this agreement to arbitrate is valid and creates rights in the parties and it is a fully warranted estimate of Massachusetts law from recent decisions of its highest court and recent legislative developments that specific enforcement of this agreement to arbitrate would be an available remedy in the Massachusetts courts.

III. The legislative history of Section 1 of the United States Arbitration Act, which is examined in detail, shows that the exclusion of "contracts of employment" in Section 1 of the Act refers unambiguously to individual contracts of employment of workers in foreign and interstate

commerce, and does not apply to collective bargaining contracts in any industries affecting commerce. In any event, it was intended to apply to the contracts of classes of workers actually in interstate commerce, such as seamen, railroad employees, stevedores and other in the maritime and transportation industries, and not to contracts of production and maintenance employees of a manufacturer, in an industry affecting commerce, such as are here involved. The legislative history is a sufficient basis for finding that "contracts evidencing a transaction involving commerce" in Section 2 of the Act covers collective bargaining contracts. These interpretations of Sections 1 and 2 of the Act are in accord with the policy of the Arbitration Act and federal labor policy. There is no merit in petitioner's argument that Section 4 of the Arbitration Act which requires jurisdiction to be founded on Title 28 U. S. C. and to be tested as if no agreement for arbitration existed, is inapplicable because the present controversy, underlying the arbitration agreement, concerns only the personal rights of employees arising out of the contract, not out of federal law, or any source of jurisdiction under Title 28.

The controversy here is over rights in a collective bargaining contract in an industry affecting commerce and jurisdiction over these rights is conferred, not by the contract, but by Section 301 of the Labor Management Relations Act. The present complaint which meets the test of Section 301 satisfies the requirements of Section 4 of the Arbitration Act and Title 28. Moreover, the underlying controversy concerns clauses in the collective bargaining contract which run to the Union only, and are not enforceable by the individual employees without prior action by the Union, where the Union's interest is sufficient to justify a cause of action under Section 301. If Section 4 of the Arbitration Act is inapplicable, Section 2 of that

Act provides an alternative basis for granting specific performance, where the court has jurisdiction under Section 301 of the Labor Management Relations Act.

IV. On the basis of diversity jurisdiction and applicable Massachusetts law, the court had jurisdiction to compel specific performance of the agreement to arbitrate. The Union had capacity to sue as an entity, by virtue of Rule 17(b) of the Federal Rules of Civil Procedure and Section 301(b) of the Labor Management Relations Act, without regard to its capacity to sue under Massachusetts law. Section 301(b) is a general capacity statute, which is an extension of Rule 17(b) and permits suit in its own name by a union representing employees in an industry affecting commerce where the court has diversity jurisdiction and state law is to be applied. The same result is reached if Section 301 is held to create a federal substantive right but the right is defined by incorporating state substantive law as a part of the federal law; or if Section 301 itself serves as a substantive right under the laws of the United States for the purpose of permitting the Union to sue in its own name, pursuant to Rule 17(b). Both the Union as an entity and all its members are citizens of states other than the state in which the petitioner was incorporated; the requisite jurisdiction amount is alleged, and at this state of the case, not denied; and the value of the right in controversy may reasonably be found to exceed Three Thousand Dollars.

Recent decisions of the Supreme Judicial Court and recent legislative developments in Massachusetts fully warrant the estimate that agreements to arbitrate in collective bargaining contracts are specifically enforceable in Massachusetts and the application of Massachusetts law in a diversity action in this case would reach the same result as the application of federal law.

**I. THE COURT BELOW WAS CORRECT IN HOLDING THAT THE NORRIS LA GUARDIA ACT DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION TO COMPEL SPECIFIC PERFORMANCE OF THE AGREEMENT TO ARBITRATE HEREIN.**

The Court below, in a careful review of the text and legislative history of the statute, correctly held that "jurisdiction to compel arbitration is not withdrawn by the Norris La Guardia Act" (R. 63) and that "an order to compel arbitration is neither barred specifically by Section 4 nor subject to the requirements of Section 7" (of the Norris La Guardia Act) (R. 68). As an apt summary of its analysis the Court quoted from *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953). "The general structure, detailed provisions, declared purpose and legislative history of that statute (Norris La Guardia Act), show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made."

Petitioner attacks this decision on the ground that it misreads the statute as excluding an injunction against an employer's breach of contract to arbitrate, and as applying only to "injunctions" prohibiting "unilateral coercive conduct" such as "union conduct in strikes and picketing" (Br. 56).

This is not an accurate reading of the Court's opinion. The Court said "For reasons to be developed below, we believe that the "injunction" at which Section was aimed is the traditional labor injunction, typically an order which prohibits or restricts unilateral or coercive conduct of either party to a labor dispute (R. 64). The enumerated requisites (of Section 7) which draw a logical line in relation to union conduct in strikes and picketing (and perhaps to some employer activities) are not at all compatible

with the situation where one party merely demands that the other be compelled to arbitrate a grievance, in accordance with a contract provision for arbitration, in which latter situation, the required findings seldom, if ever, could be made, either affirmatively or negatively. They just do not sensibly apply." (R. 65-66).

Petitioner argues that the court in interpreting "injunction" in Section 7 has, in effect, said that if a statute contains only a very narrow exception, the statutory command should be interpreted as not applying to cases which it is difficult or impossible to bring within the exception (Br. 57). This argument entirely overlooks the fact that the Court did not seek to make the order to compel arbitration an *ad hoc* exception to Section 7 of the Act. It held that such an order is not included in the prohibitions of the Act at all. (R. 65-67).

Petitioner further argues that the reasoning of the court runs counter to a long line of decisions holding that the prohibition of Section 7 is not confined to cases of unilateral coercive conduct but has been applied to bar injunctions against non-coercive conduct such as breaches of obligations under statutes or contracts (R. 57-58). None of the cases which it cites involves an order to compel arbitration. Some involve no labor dispute at all (*Fitzgerald v. Abramson*, 89 F. Supp. 504 5D N. Y. 1950). Others are silent as to the nature of the relief requested. (*Wilson v. Dias*, 72 F. Supp. 198 Pa. 1947). Still others involve issues held to be within the exclusive primary jurisdiction of the National Labor Relations Board (*United Packing House Workers v. Wilson & Co.*, 80 F. Supp. 563 N. D. Ill. 1948; *California Ass'n. v. Building Trades Council*, 178 F.2d 175 (C. A. 9, 1949); see *Wilson Employees Representation Plan v. Wilson & Co.*, 53 F. Supp. 23 (S. D. Calif. 1943) or subject, in the first instance, to the Adjustment Boards, under the Railway Labor Act (*Missouri K. T. R. R. Co.*

v. *Randolph*, 164 F.2d 4 (C. A. 8, 1947 cert. den. 334 U. S. 818 (1948)). Others involve strikes, picketing, boycotts, bombing or violence, in which the moving party either did not attempt or attempted but failed to prove one or more of the essential requisites of Section 7 (*Green v. Oberfell*, 121 F.2d 46, 63 (D. C. Cir. 1941), *Lee Way Motor Freight Inc. v. Keystone Freight Lines*, 126 F.2d 931 (C. A. 10, 1942); *East Texas Lines v. Teamsters Union*, 163 F.2d (C. A. 5, 1947).

It is unnecessary to attempt to distinguish these cases further, since there is no conflict of decision among the Courts of Appeals on the issue decided by the Court below. The decisions of the Third, Fifth, and Sixth Circuits are in accord with it and none opposed: *Textile Workers Union v. Lincoln Mills of Alabama*, 230 F.2d 81, 84-85 (C. A. 5, 1956); *Milk and Ice Cream Drivers v. Gillespie Milk Products Corp.*, 203 F.2d 650 (C. A. 6, 1953); *Local 19 v. Buckeye Cotton Oil Co.*, 236 F.2d 776 (1956); see *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (C. A. 3, 1956).

Petitioner next attempts to distinguish *Virginian Railway Co. v. System Federation*, 300 U. S. 515 (1937), *Graham v. Brotherhood of Firemen*, 338 U. S. 232 (1949) and *Syres v. Oil Workers International Union*, 350 U. S. 892 (1955), upon which the Court below relied, on the ground that in the first two cases the plaintiffs were seeking to enforce a right created by statute, and here the union is seeking to enforce a right under a contract, and the *Syres* case on the ground that all that was decided there was that the cause of action alleged did arise under the laws of the United States (Br. 59-60, R. 65). But the *Syres* case, which sought an injunction against the enforcement of a contract, did not depend upon any special statutory provision of the Railway Labor Act, and concerned employees subject to the Labor Management Relations Act

of 1947. The *Per Curiam* opinion of this Court cited *Steele v. Louisville & Nashville R.*, 323 U. S. 192 (1944), *Tunstal v. Bro. of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944), and *Railroad Trainmen v. Howard*, 343 U. S. 768 (1952) and these cases relied on the *Virginian Railway* and *Graham* cases, which held "the evident purpose of this section (Section 9 of the Norris La Guardia Act) as its history and context show was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form and to confine the injunction to the particular acts complained of and found by the Courts" (*Virginian Ry. Co., supra* at 563). It is immaterial, even if true, that jurisdiction of the court here is based on rights asserted under a contract rather than under a statute. The nub of the *Virginian Ry. Co.* decision and its progeny on this score is that the Norris La Guardia Act does not deprive the Court of jurisdiction to issue equitable relief where the relief sought does not trench upon the interdictions of the Norris La Guardia Act. To require non-discriminatory treatment in a bargaining unit is no different, in principle, from requiring specific performance of an agreement to arbitrate. Neither contravenes any prohibition or policy of the Norris La Guardia Act. On the contrary, the decree for specific performance of the agreement to arbitrate effectuates the policy of the Act. (See '29 U. S. C. Section 108) *Wilson Bros. v. Textile Workers Union*, 132 F. Supp. at 165-166 (S. D. N. Y. 1954).

Petitioner argues that the action of Congress in refusing to repeal the Norris La Guardia Act as applied to Section 302 of the House Bill (which as amended became Section 301 of the Act) shows that Congress was unwilling to pay the price of making the Norris La Guardia Act inapplicable in order to allow federal courts to enforce collective bargaining agreements. But Section 301 of the

Labor Management Relations Act is not coextensive with the Norris La Guardia Act. Some breaches of contract, such as a strike in violation of a no-strike clause or an arbitration clause which is a virtual no strike clause, are non-enjoinable under the Norris La Guardia Act. *W. L. Mead v. Teamsters Union*, (C. A. 1, 217 F.2d 6, (1954)). Equitable relief, however, with respect to other breaches of contract may be granted in terms which do not trench upon the interdictions of the Norris La Guardia Act. *Independent Petroleum Workers v. Esso Standard Oil Co.*, *supra*; see *Sanford v. Boston Edison*, 316 Mass. 631; *Sures v. Oil Workers International Union*, *supra*. The refusal of Congress to repeal the Norris La Guardia Act in connection with Section 301 simply means, as we point out more fully in our discussion of the legislative history of Section 301 (Point II *infra* pp. 24-25, 31-33) that Section 301 confers jurisdiction on the federal courts to entertain suits for legal and equitable relief in cases of breach of a collective bargaining agreement, except where the Norris La Guardia Act is applicable by its terms (R. 62).

Petitioner further argues that the decision of the Court below applies not only to arbitration clauses, but opens up the whole field of labor contracts to policing by injunctive process of a scope which cannot now be foreseen. (R. 61-62). This argument is not a valid reason for denying relief where it is warranted. It goes to the wisdom of making collective bargaining contracts valid, binding and enforceable. As to this, the Congress which enacted the Labor Management Relations Act of 1947 has already spoken. S. Rept. No. 105, 80th Cong. 1st sess. pp. 15-17; H. Rept. No. 245, 80th Cong. 1st sess. p. 46. There is no indication in the legislative history of the Labor Management Relations Act that Congress intended to expand the Norris La Guardia Act to thwart that intent.

Finally, petitioner insists that the holding of the Court,

below results in a policy of inequality which is at variance with Congressional policy, in that the practical effect of the Court's holding is to make arbitration agreements enforceable only as against employers, whereas the chief object of Congress in 1947 was to provide equality of treatment between employees and employers. (Br. 61-64). As the Court below pointed out, however, an order to compel arbitration can be granted against either party, without violating the Norris La Guardia Act. In the situation where the union strikes in violation of an arbitration promise, the employer is not without remedy. He may have available injunctive remedies in the state court, and he unquestionably has remedies in the Federal courts, although not the remedy of injunction. See *Mead v. International Brotherhood of Teamsters* (C. A. 230 F.2d 526 (1954)). Moreover, although the Norris La Guardia Act was not intended as a "one way street", it was primarily intended as a protection to union and employee activities. "The purpose of the bill is to protect the rights of labor in the same manner that Congress intended when it enacted the Clayton Act . . . which Act, by reason of its construction and application by the Federal Courts is ineffective to accomplish the Congressional intent" H. Rept. 669, 72nd Con. 1st sess. p. 3. "The Norris La Guardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as defined by the later Act." *United States v. Hutcheson*, 312 U. S. 219, *Milk Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91. To make mutuality of remedy a requirement, under these circumstances, would be to contravene an unambiguous policy of Congress.

In any event, the equal treatment for which respondent argues would not effectuate any policy of Congress. What it seeks is either the right to enjoin a strike in violation of a contract, if it is required to perform its agreement

to arbitrate, or the right not to perform its agreement to arbitrate, as the price of permitting the union the right to strike in violation of its contract. Equality of treatment under the first alternative would violate the policy of the Norris La Guardia Act; equality of treatment under the second would violate the policy of the Labor Management Relations Act. No public policy is served by such an approach.

The Court below chose not to rest its decision on the term used to describe the order to arbitrate, whether as a decree for specific performance or a mandatory injunction. There is, however, strong separate support in the legislative history, the text of the Act and the cases for the view that the Act was intended to bar only prohibitory and not mandatory injunctions of the kind here sought. See *Virginia Ry. Co. v. System Federation* No. 40, 300 U. S. 515; *Graham v. Brotherhood of Firemen*, 338 U. S. 232; *Sanford v. Boston Edison Co.*, 316 Mass. 631, 637-8; the George Amendment 75 Cong. Rec. 4772<sup>1</sup>; and the specific

<sup>1</sup> On February 26, 1932, Senator George introduced the following amendment: (75th Cong. Rec. 4772)

"No court of the United States shall have jurisdiction, upon the hearing of an application for an interlocutory injunction, to grant a mandatory injunction compelling the performance of an act in any case involving a growing out of any labor dispute hereinafter defined."

Senator Norris, the sponsor and prime mover of the legislation in the Senate, stated:

"Mr. President, as I understand the amendment—I think I understand it—I have no objection to it and I think it would very materially improve the bill, if agreed to . . ." (*ibid.*, p. 4772)

Senator George then explained the amendment as follows:

"The true function of an injunction is to restrain anyway, but the practice has grown up of compelling the doing of affirmative acts; and in all labor disputes, beyond the peradventure of a doubt, an interlocutory injunction should not include the requirement that any affirmative act be done by any party to that dispute."

interdictions in the text of Sections 4, 7 and 9 of the Act which forbid only prohibitive and not mandatory injunctions.

The history of the George Amendment shows that (1) the amendment added a prohibition, not elsewhere in the bill, against preliminary mandatory injunctions. As Senator Norris stated: "I think it would very materially improve the bill if agreed to" (75 Cong. Rec. p. 4772); (2) the prohibition was limited to the issuance of mandatory injunctions upon an interlocutory hearing, and as Senator George stated, "There is no attempt in this amendment to curb or restrict the power of the Federal Courts to grant a mandatory injunction" on final hearing (*ibid* 4772); and (3) even this limited prohibition against the issuance of mandatory injunctions was not included in the conference report and the bill, as finally enacted, contains no prohibition under the injunction sections against the issuance of any mandatory injunction.

Obviously, it is the substance of the order, not the label

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"In many States, or at least in some States, mandatory injunctions are forbidden until final trial. This amendment simply provides that in labor disputes, as defined in this act, no court of the United States shall have the power to issue a mandatory injunction compelling an affirmative act upon an interlocutory hearing. Of course, the court would have the power in a proper case to restrain until final hearing or final trial; and in that event there is no attempt in this amendment to curb or to restrict the power of the Federal courts to grant a mandatory injunction." (*ibid*. p. 4772)

The amendment was amended by making the prohibition applicable also upon the hearing of an application for a temporary restraining order, and as thus amended was agreed to by the Senate (75 Cong. Rec. Pt. 5 pp. 4772-4773), and became Section 6 of the Senate Bill. The House bill, however, did not contain any such provision. In Conference, the conferees dropped the Senate amendment and the bill became law without it. See 72nd Congress 1st Sess. Sen. Doc. No. 71 Conf. Rept. March 14, 1932; H. Rep. No. 793, Conf. Rept. March 14, 1932; H. Rep. No. 821, Conf. Rept. March 16, 1932; 75 Cong. Rec. pp. 5549-50, 6336-7. See Witte: *The Federal Anti-Injunction Act* 16 Minn. Law Review 638.

attached to it which determines whether the Norris La Guardia Act applies. A no-strike clause could not be enforced by the simple device of labelling the court's order a decree for specific performance rather than an injunction, since the order, however labelled, would run up against the prohibition of Section 4 of the Act. By the same token, however, an order to enforce an arbitration clause should not be denied by the simple device of labelling it an "injunction" rather than a decree for specific performance, since the order neither involves nor seeks to enjoin any of the activities made non-enjoinable by Section 4 or conditionally non-enjoinable by Sections 7 and 9.

## II. SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 CONFFERS JURISDICTION ON THE DISTRICT COURT AND THE DISTRICT COURT IS AUTHORIZED TO COMPEL SPECIFIC PERFORMANCE OF THE AGREEMENT TO ARBITRATE IN THE COLLECTIVE BARGAINING CONTRACT HEREIN.

The Court below held that Section 301 conferred jurisdiction over the subject matter of the suit herein, under *Association of Westinghouse Employees v. Westinghouse Electric Corporation*, 348 U. S. 437, because the Union is here seeking a remedy for a breach of the promise to arbitrate which runs to the union, *qua* union, and not a right which the individual employee equally could enforce on a suit on his personal cause of action. (R. 80-81). The Court also held that "in a Section 301 case, the *Erie*, *York* and *Bernhardt* decisions do not require us to apply state law concerning the 'forms and mode' of enforcing an arbitration agreement" (R. 81) and that the availability of specific performance is a matter not of right, but of remedy, and is governed by the federal law of the forum. (R. 70).

The Court concluded, however, that Section 301 was not itself a legislative authorization for decrees of specific per-

formance of arbitration agreements. "We think that is reading too much into the very general language of Section 301. The terms and legislative history of Section 301 sufficiently demonstrate, in our view, that it was not intended or to deny any applicable existing remedies . . . Arbitration was scarcely mentioned at all in the legislative history . . . The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of arbitration agreements . . . (R. 73). As additional support, the Court referred first, to the "hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements" (R. 72-73) which it believed could not be ignored as a matter of federal law without a more explicit statutory basis than that provided by Section 301 "and second, to the "practical grounds" that Section 301 lacks "the comprehensive and consistent scheme that legislative action could afford and which is necessary for effective, yet safeguarded arbitration." (R. 73).

The Court's reluctance to employ the grant of authority which it finds in § 301 to award the relief here requested is based, we think, on insufficient grounds. Before discussing those grounds, we turn first, to petitioner's argument that the District Court entirely lacked jurisdiction of the suit herein under § 301 (Br. 52), and second, to its argument that, in any event, the sole purpose of § 301 was to authorize damage actions, without making available equitable remedies of any kind. (Br. 44-48).

#### *A. The District Court Had Jurisdiction of the Suit Herein Under Section 301.*

The petitioner asserts that since the union is here seeking to enforce the right of Mr. Boiardi to receive a higher rate of pay and of Mr. Armstrong to be reinstated after his discharge, the District Court had no jurisdiction of

the suit, under the decision of this Court in the *Westinghouse* case, because that case held that Sec. 301 did not authorize suits in the federal courts to enforce the personal rights of employees. It argues that these rights are no less personal to the employees because the Union seeks to enforce them by compelling arbitration than by a suit for a declaratory judgment as in *Westinghouse*. (Br. p. 52).

The decision of the majority in *Westinghouse* was that Sec. 301 did not authorize the union to sue on behalf of the employees for accrued wages, 348 U. S. at 461, or to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer (*id.* at 461) or to sue on a claim for wages for employees arising from separate hiring contracts between the employer and each employee (*id.* at 464). The Court did not discuss or decide whether a declaratory judgment was warranted.

Here, the complaint states a claim based on the violation of a promise by the employer to the union to arbitrate, as the final step in the contract grievance procedure, which the employer and the union alone administer (Art. XII, 1, Steps 3-4; 2; Art. XIII, R. 32-33). By its terms, the contract excludes employees from the arbitration clause. Only the Union and the Company may submit a matter to arbitration and the only parties to the arbitration itself are the Union and the Company, each of which has agreed on the method of selecting the arbitrator, the scope of arbitration, the division of the costs, and the final binding and conclusive effect of the award upon the parties. (R. 32-33). The complaint makes no claim that the Company has failed to pay employees accrued wages, or has violated the individual contracts of hire. The claim is that the Company has refused to arbitrate in violation of its agreement to arbitrate as set forth in Article XIII of the contract. (R. 45, 46).

Moreover, the arbitration clause is linked with the no-strike clause, which prohibits strikes in connection with any matter subject to the grievance procedure, unless the strike is called over a grievance which has been processed through the grievance procedure and arbitration has not been resorted to under the contract. In both the arbitration and no-strike clauses, the benefits and obligations run to the union, *qua* union, and to the employer. The personal rights of individual employees are not directly involved, and in most jurisdictions could not be enforced without prior action by the Union under the arbitration clause. See *Cox: Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 648 (1956).

B. *Section 301 Grants Authority in Its Own Terms to Compel Specific Performance of an Agreement to Arbitrate Herein.*

1. The Legislative History and Policy.

While the legislative history of the statute is unclear or silent as to many matters, it is not accurate to say, as the Court below did, that "arbitration was hardly mentioned at all in the legislative history" (R. 73). On the contrary, Title II of the Act makes it the policy of the United States to encourage the inclusion in collective bargaining agreements of provisions for the final adjustment of grievances regarding the application or interpretation of such agreements and otherwise to facilitate the use of voluntary arbitration as a part of the collective bargaining process (Section 201 (b) and (c)). And the problem of the rights and remedies arising out of the breach of an agreement to arbitrate, along with breaches of collective bargaining contracts, was considered under both Title I and Title III of the Act. Indeed, the legislative history goes far toward showing that both

Houses of Congress intended that agreements to arbitrate should be valid, binding and enforceable and that remedy of specific enforcement should be available as a federal remedy. The issue on this score was only over the question of whether the remedy should be both by way of an unfair labor practice and a private suit or by private suit alone. This issue was resolved in conference in favor of a private suit alone.

Thus, the Senate bill (S. 1126) made it an unfair labor practice for either an employer or a labor organization to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration (Sections 8(a) (6) and 8(b). (5)). The Board was given full authority to issue the necessary cease and desist and affirmative orders to remedy violations (Section 10(c) and (h)). This, in effect, would have authorized the Court of Appeals to enforce a Board order granting specific performance of an agreement to arbitrate.

Section 301 of the bill was regarded as providing a similar right to the parties to obtain specific enforcement of such agreements by private suit in the District Court. The Senate Report plainly indicates that the rights and remedies under Section 8 (a) (6) and 8 (b) (5) were to be correlative with those under Section 301 (S. Rep. No. 105, 80th Cong. 1st session). It states that "Section 301 relates to suits by and against labor organizations for breach of collective bargaining agreements and should be read in connection with the provisions of Section 8 of Title I also dealing with breaches of contract. (*id* at p. 30). While Title III of the Committee bill treats this subject by giving both parties the right to sue in the United States District Court, the committee believes that such action should also be available before an administrative body" (*id* at p. 20-21). Since the action before the administrative body made available for breach of an agreement to arbitrate was made an unfair

labor practice by Sections 8 (a) (6) and 8 (b) (5) of the bill, which would result in effect in a Court of Appeals decree of specific performance, it is a proper inference that the Committee intended a similar remedy to be available to private litigants in the District Court under Section 301. The Senate Minority Report did not dispute this intention, but objected to it on the ground that it gave the parties a choice of bringing their action before the Board or the District Courts, and the necessity for uniformity and the avoidance of conflict in judicial decisions made the scheme undesirable (S. Min. Rep. No. 105, Pt. 2 on S. 1126, 13).

This view is confirmed by the further language of the Report with respect to Section 301, under the heading "Enforcement of Contract Responsibilities". "The committee bill makes collective bargaining contracts equally binding and enforceable on both sides. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in Title I.) We feel that the aggrieved party should also have a right of action in the federal courts. Such a policy is completely in accord with the purposes of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract binding on both parties should be made' . . ."

In this, it is evident that the Committee gave the same content to Section 301 as it had clearly given to Sections 8 (a) (6) and 8 (b) (5), under the same policy of compelling a binding agreement.<sup>2</sup>

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<sup>2</sup> See comment of Senator Morse, objecting to the elimination in conference of Secs. 8(a)(5) and 8(b)(6), on the ground that these sections and Sec. 301 provided alternative procedures, and both should be retained. "I am further disappointed in the conference report bill

The Report further noted that "to encourage the making of agreements and to promote industrial peace through faithful performance by parties, collective agreements affecting interstate commerce should be enforceable in the federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal Courts in disputes affecting commerce . . ." The Committee pointed out the difficulty in bringing such suits was that "There are no federal laws giving the employer or even the Government itself any right of action against a union for any breach of contract. Thus, there is no substantive right to enforce in order to make the union suable as such in Federal courts . . . Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements and will thereby promote industrial peace. . ." (*id* at pp. 15-17).

From the foregoing, it appears that Senate bill not only sought to give parties similar rights and remedies in cases brought before the Board and in the District Court, with respect to violations of collective agreements and agreements to arbitrate, but that it declared as a matter

in that it has digressed from a very vital provision which we had in the Senate bill, a provision which members of the Committee know I argued for at some length. It was in and out of the bill, but we finally got it back into the bill. It offered an alternative procedure for the handling of violations of contracts, either on the part of the union or the part of the employer, by making such violations unfair labor practices. I was willing to go along with the court action proposal, as an alternative if conditions became so bad in the relationship between an employer and a union that the employer felt that he could not settle the differences by collective bargaining or the administrative procedures of the National Labor Relations Board through bringing a charge of unfair labor practice. But I felt that we ought to have both the unfair labor practice procedure and the court suit procedure as alternative procedures." (93 Cong. Rec. 1558 June 5, 1947 80th Cong. 1st Sess.)

of substantive law, the validity and enforceability of such agreements in language paralleling the substantive language of Section 2 of the United Arbitration Act.<sup>3</sup>

The House bill took a similar approach (H.R. 3020, 80th Cong. 1st Sess.). It defined (Sec. 2(11)) the terms "bargain collectively" and "collective bargaining" as meaning "(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such dispute, following such procedure"; and it made it an unfair labor practice for employers, employees or their representatives "to refuse to bargain collectively" (Sections 8(a) (5), 8(b) (2)).

Title III of the House Bill provided under the heading "Equal Responsibility and Liability" in Section 302(a):

"Any action or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the Court otherwise has jurisdiction of the cause."

and in Section 302(e) that in such actions or proceedings, the Norris-LaGuardia Act shall not have any application in respect of either party.

H. Rep. No. 245 stated the purpose of the two proposals as follows:

As to Section 2 (11) A, "when parties have agreed upon a procedure for settling their differences, and the agreement is in effect, they will be required to follow the procedure or be held guilty of an unfair labor practice. Most

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<sup>3</sup> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any such contract (9 U. S. C. Section 2).

agreements provide procedures for settling grievances, generally including some form of arbitration, as the last step. Consequently, this clause will operate in most cases, except those involving the negotiation of new contracts." (p. 21)

As to Section 302 (a), "when labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens. . . . For this reason, not only does the section, as heretofore pointed out, make the labor organization equally suable, but it also makes the Norris La Guardia Act inapplicable in suits and proceedings involving violations of contract, which labor organizations voluntarily and with their eyes open enter into." (p. 46).

From the foregoing, it is evident that Section 302(a) of the House Bill, like Section 301(a) of the Senate Bill, was intended to give parties to a collective bargaining or arbitration agreement, rights and remedies in the District Courts by private suits correlative to their rights and remedies in proceedings before the Board under Sections 2(11), 8(a) (5) and 8(b) (2) of the House Bill and Sections 8(a) (6) and 8(b) (5) of the Senate Bill. It is, of course, entirely clear that Section 302(a) of the House Bill authorized full legal and equitable relief, within the terms of the section, since if it were limited to damages, it would not have been necessary to propose repeal of the Norris La Guardia Act as in Section 302 (e) of the House Bill.

In conference, however, both Senate and House proposals to make an unfair labor practice of a violation of a collective bargaining agreement or an agreement to arbitrate were eliminated. Section 302(e) of the House Bill was also eliminated except for the provisions embodied in Section 301 (e) of the Act (H. Conf. Rep't. No. 510, pp. 41-2, 66)

and Section 301(a) of the Senate Bill was retained with the explanation that "Once the parties have made a collective bargaining contract, the enforcement of that contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." (*id* at p. 35)

Petitioner argues that the conference agreement, eliminating the proposed unfair labor practice, shows that the Congress "deliberately stopped short of providing enforcement of such agreement through judicial or other process." (Brief, p. 48) And it attempts to support this position by an excerpt from the Conference Report, relating to a different Section 8(d) and dealing, not with rights and remedies in suits under Section 301 but with proposed unfair labor practices which the Conference Report eliminated (Br. p. 47, 1st paragraph) (Cf. H. Conf. Rept. No. 510 on H.R. 3020, 80th Cong. 1st Sess. p. 35, with Section 8(d); S. 1126 and Section 8(d) of the Act). This argument ignores the fact that although the Congress which enacted the Labor Management Relations Act was unwilling to have the Board compel arbitration, it was not in the least unwilling to allow the enforcement of arbitration or collective bargaining agreements by the Courts. (93 Cong. Rec. 6600) And, so far as its legislative history shows, it gave the courts the

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<sup>4</sup> In construing a similar phrase in the Massachusetts statute G. L. (Ter. Ed. C. 150, Sec. 11) providing that arbitration agreements are valid and enforceable by "proper judicial proceedings", the Supreme Court held that:

"The defendant's position is that under the statute 'proper judicial proceedings' for an award of money can only mean actions at law. This overlooks, however, both the nature of the contract and the purpose of the statute. The contract purports to afford a prompt and peaceful settlement of labor disputes, in part by resort to arbitration. . . . If the equitable remedy should be ruled to be unavailable to the plaintiffs, the alternative would be strife or delay attending a strike. . . . Such a restricted interpretation of the legislative intent would not be reasonable." *Magliozzi v. Handschumacher Inc.*, 327 Mass. 569, 99 N.E. 2d, 586.

unambiguous direction to treat such agreements as "valid, binding and enforceable" (S. Rept. No. 105, p. 17).

The result of the conference agreement was thus to confer jurisdiction on the courts, under Section 301(a), to entertain suits for and grant both legal and equitable relief, except where the Norris La Guardia Act applies.

Section 301(a) of the Senate bill appears to have been intended to reach precisely this result, although in other proposed sections, the Senate sought but ultimately abandoned the attempt to achieve wider authority to have the Courts of Appeal, on Board orders, grant full preventive and affirmative relief against violations of collective bargaining and arbitration agreements.

Section 302(a) of the House Bill was also unquestionably aimed at reaching this result, but without the restrictions of the Norris La Guardia Act. When the House agreed in conference to drop its proposal to make the Norris La Guardia Act inapplicable, and both Houses abandoned their proposals to make violation of collective bargaining and arbitration agreements unfair labor practices, Senate Section 301 (a) and House Section 302(a) were brought into harmony and Senate Section 301(a) was adopted with the technical jurisdictional features of the Senate Bill. The consequence of these modifications was to deny employers and unions the right to obtain equitable relief against each other without compliance with the applicable provisions of the Norris La Guardia Act and when this not possible to remit them to an action for damages<sup>5</sup> but nothing

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<sup>5</sup> It is submitted that this is the explanation of the statement on this score by Senator Taft in his summary of the principal differences between the conference agreement and the bill which the Senate passed (93 Cong. Record June 5, 1947, p. 6600). (Cited by Petitioner in its Brief p. 44). Senator Taft stated that the House conferees objected to Section 8(a) (6) and 8(b) (5). He then stated that "The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective bargaining agreement

in the legislative history requires that Section 301(a) be construed as depriving the Courts of jurisdiction to grant equitable relief where such relief does not trench upon the interdictions of the Norris La Guardia Act. And nothing in the Norris La Guardia Act has application, as we have already pointed out, to deprive the Courts of jurisdiction in a suit by a labor union against an employer to obtain the mandatory relief here sought to require the employer specifically to perform its agreement to arbitrate.

These conclusions from the legislative history are made more weighty in the light of the legislative purpose in adopting Section 301, which was "obviously to prescribe an 'effective method of assuring freedom from economic warfare for the term of the agreement' and 'to encourage the making of agreements and to promote industrial peace through faithful performance by the parties (of) collective bargaining agreements . . . enforceable in the federal courts'. Sen. Rept. No. 105, 80th Cong. 1st Sess. 16." . . . The legislation intends "the maximum degree of enforcement of arbitration contracts." *Textile Workers v. American Thread Co.*, 113 F. Supp. 137.

If all that Section 301 authorizes are actions for damages, it is difficult to see why the Committee Reports do not simply say so. The intent in both the House and the Senate

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were retained in the conference agreement (Section 301). This statement does not purport to be more than a short-hand reference to the Section as a whole, which in Section 301(b) contains specific reference to liability for damages and money judgments and it does not fully or accurately reflect the discussion of Section 301 in Sen. Rept. 105, pp. 15-16, 20-21, 23. Moreover, Senator Taft in the following sentence stated with respect to Sections 8(a) (6) and 8(b) (5) on the one hand and Section 301 on the other, "If both provisions had remained there would have been a probable conflict of remedies and decisions." This latter statement is intelligible only if it is understood to mean, as the Senate Report indicates, that private litigation under Section 301 authorizes some equitable remedies. Otherwise, there would have been no conflict of remedies, since the Board is not authorized to award damages as such.

in their versions of Section 301 was certainly to authorize more, and the legislative history, while not altogether free from doubt, is more consistent with an interpretation which would permit the specific enforcement of an agreement to arbitrate, in accordance with the declared policy of the Act, to encourage arbitration, than with an interpretation contrary to that policy which would remit the parties to actions for damages alone.

## 2. The context.

The language and context of Section 301 confirms the conclusion based on its legislative history that it confers jurisdiction on the District Courts with authority to grant affirmative and equitable relief, except where the Norris La Guardia Act applies and is not limited to damages. To those courts which construe the statute as creating substantive rights, the unqualified use of the word "suits" in Section 301(a) as a generic term of comprehensive significance (see *Kohl v. United States*, 91 U.S. 375 and *Cohen v. Virginia*, 6 Wheat 405) lends support to the view that it "authorizes injunctive process for the full enforcement of the substantive rights created by Section 301(a) . . ." *Milk Drivers Union v. Gillespie*, 203 F.2d 650 (C.A. 6, 1953).

In the context of the remaining sections of the Act, this meaning is unaffected. Thus, when the Act intended to limit recovery to damages, as in Section 303(b), it found appropriate language readily available. See *Bakery Sales Drivers v. Wagshal*, 333 U.S. 437; H. Conf. Rep't. No. 510 on H.R. 3020 p. 67; Katz and Jaffee "*Enforcing Arbitration Clauses by Section 301, Taft Hartley Act*" 8 Arbitration Journal 80.

Moreover, Section 301(b) which contains a provision permitting a labor organization to sue or be sued as an entirety and in behalf of employees whom it represents

in the courts of the United States, contains limitations with respect to damages, applicable only to labor unions and does not purport to limit the equitable relief which is afforded in Section 301(a) against employers. Thus, the Senate Report makes it clear that Section 301(b), as well as Section 301(c), (d) and (e) are specifically designed to overcome procedural difficulties which render suits against unions difficult and to provide an appropriate means for enforcing judgments for damages. (Sen. Report No. 105, pp. 16-17). Nowhere, in these sections, is there any language or intent to limit Section 301(a) to actions for damages in suits by unions against employers under Section 301(a). Moreover, Sections 301(b) through (e) were intended to apply generally to labor unions alone, as distinguished from Section 301(a) which by its terms is applicable to employers and labor unions alike, but only in suits for violations of contracts, under the special limitations there described. These subsections are thus hardly to be construed as limiting the meaning of the words "suits" in Section 301(a) to deny equitable relief against employers (H. Conf. Rep't. No. 510, p. 66).

In the light of these considerations, a majority of courts have construed Section 301(a) as authorizing equitable and other affirmative relief, as well as damages, in suits by labor organizations against employers for violation of collective bargaining contracts both before and after the decision of this Court in the *Westinghouse* case.<sup>6</sup>

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<sup>6</sup> *Wilson Bros. v. Textile Workers Union* (D.S.D.N.Y. 1953) appeal dismissed for procedural cause 224 F.2d 176 (C.A. 2, 1955); *UE v. Landers, Frary and Clark*, D. Conn. 119 F. Supp. 877 (1954); *Textile Workers Union v. Aleo Mfg. Co.*, (D.M.D.N.C.) 94 F. Supp. 626; *Local 379 v. Jacobs Mfg. Co.*, (D. Conn.) 120 F. Supp. 228; *Mt. States Div. v. Mt. States Tel. Co.*, (D. Colo.) 81 F. Supp. 397; *Evening Star Newspaper Co. v. Columbia Typographical Union*, (D.C.D.C.) 124 (1954) F. Supp. 322; *Insurance Agents v. Prudential Ins. Co.*, (D.C.E.D.Pa.) 122 F. Supp. 869; *United Automobile Workers v. Buffalo Springfield Roller Co.*, (D.S.D. Ohio) 131 F. Supp. 667; *Textile*

*C. The District Court With Jurisdiction Under Section 301 Has Inherent Power as a Court of Equity to Compel Specific Performance of the Agreement to Arbitrate Herein.*

If Sec. 301 is regarded as not providing a sufficiently firm statutory basis upon which to grant specific performance of the agreement to arbitrate herein, an appropriate source of such authority may be found in the inherent power of the federal equity court to mould its relief, in cases over which it has jurisdiction, with all the power of the Court of Chancery, to effectuate declared policy in the field of labor relations. See Brown, J. (dissenting opinion) *Textile Workers Union of America v. Lincoln Mills of Alabama*. No. 211 October Term, 1956 Transcript of Record, pp. 55, 58-66.

The objection is raised by the petitioner that such authority is lacking because it would contravene "a fundamental and long settled principle of contract law", never changed, except as the result of the particular terms of a statute, that contracts to arbitrate future disputes under a contract are not specifically enforceable (Br. 38-39).

Petitioner is mistaken. The rule is neither fundamental nor settled. Judge Cardozo in upholding the validity of the New York Arbitration Act, in 1921, characterized it as "the ancient rule" which "with its requirements and exceptions was criticized by many judges as anomalous and unjust . . . It was followed with frequent protest, in deference to early precedents. Its hold, even upon the common law, was hesitating and feeble . . . The judges

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*Workers Union v. American Thread Co.*, (D.C. Mass.) 1954 113 F. Supp. 137; *Local 19 v. Buckeye Cotton Oil Co.*, (C.A. 6) 236 F.2d 776 (1956); *Textile Workers Union of America v. Arista Mills Co.*, (C.A. 4), 193 F.2d 529; see *Independent Petroleum Workers v. Esso Standard Oil Co.*, (C.A. 3), 235 F.2d 401; Mendelsohn: *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*. 66 Yale L. J. 167 (1956).

might have changed the law themselves if they had abandoned some early precedents as at times they seemed inclined to do. They might have whittled it down to nothing as indeed was done in England, by distinctions between promises that are collateral and those that are conditions" (citing cases), *Berkowitz v. Arbib*, 230 N.Y. 261.

It is "hoary and probably misguided" (Magruder, J. R. 72); it "rests on merely weak historical arguments" (Wyzanski, J., *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137). It is "an anachronism of our American law" H. Rep. No. 96, 68th Cong. 1st Sess. "See the adverse comments of Judge Hough in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 against what he assumed to be the law in the federal courts and compare with the shift in judicial attitude reflected by the reservation of this question in Mr. Justice Brandeis' opinion in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582" (Frankfurter, J. (concurring opinion) *Bernhardt v. Polygraphic Company of America*, 350 U.S. 205 at 210. See *Kulukundis Shipping Co. v. Amtorg Trading Corporation*, 126 F.2d 978, 982-984 (C.A. 2)).

Since "the vigorous legislative movement" which "got under way in the 1920's expressive of a broadened outlook of view on this subject", the encouragement of arbitration as a governmental policy in enactments relating to labor relations matters has been consistent<sup>7</sup> and

<sup>7</sup> 44 Stat. 577 (1926), 45 U.S.C. Sec. 157-159 (Railway Labor Act) 47 Stat. 72 (1932) 29 U.S.C. Sec. 101, 108, (Norris La Guardia Act). See Sen. Rept. No. 163 p. 25, Pt. 1, p. 27, Pt. 2, p. 13; H. Rept. No. 669 p. 10, 72nd Cong. 1st sess.; 49 Stat. 449 (1935) 29 U.S.C. Sec. 151 (National Labor Relations Act); 49 Stat. 1189, (1936), 45 U.S.C. Sec. 181 et seq. (Carriers by Air Act); 61 Stat. 136 (1947) 29 U.S.C. Sec. 151, 171-178, particularly Secs. 171, 173(d) (Labor Management Relations Act of 1947). See Mendelsohn, *Enforceability of Arbitration Agreements under Taft-Hartley Section 301*, 66 Yale L. Rev. 167, at 178 fn. 45 (1956); Plock, *Methods Adopted by States for Settlement of Labor Disputes, without Original Recourse to Courts* 34 Iowa L. Rev. 430 (1949).

the use of arbitration has been fostered by governmental agencies, and the courts.<sup>8</sup>

Arbitration clauses are now in widespread use in collective bargaining agreements,<sup>9</sup> and serve an important function as a substitute for the strike or lockout, in the settlement of disputes that might otherwise erupt in industrial strife. Under these circumstances, to hold that agreements to arbitrate in collective bargaining contracts are

<sup>8</sup> The importance of including an arbitration procedure in collective bargaining agreements was stressed both by the President's Labor Management Conference in 1945, Committee VI Report, in 3 President's National Labor Management Conference 139-143 and by the War Labor Board, whose position is summarized in Comment 5 C. C. H. Lab. L. Rep. Par. 51904 at 51035 (1954). The National Labor Relations Board has developed a policy of declining jurisdiction over unfair labor practice charges of unilateral action in violation of the recognition clause of a collective bargaining contract, where arbitration procedures are available under the contract, to the end that "Every encouragement should be given to the making and enforcement of such clauses." *Matter of W. L. Mead Inc.*, 113 N.L.R.B. 109 (1955); *Spielberg Mfg. Co.*, 112 N.L.R.B. 139 (1965); *United Telephone Co.*, 112 N.L.R.B. No. 103 (1955); *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706-7 (1943) modified on other grounds and enforcement granted 141 F.2d 785 (C.A. 9, 1944); Note: *Jurisdiction of Arbitrators and State Courts over conduct constituting Both a Contract Violation and an Unfair Labor Practice*, 69 Harv. L. Rev. 725; *United Electrical Radio and Machine Workers of America, Local 259 v. Worthington Corp.*, 236 F.2d 364 (C.A. 1, 1956); *Post Publishing Co. v. Cort*, 1956 Mass. A.S. 614; *Leonard v. Eastern Mass. Street Railway Co.*, 1957 Mass. A.S. — January 21, 1957.

<sup>9</sup> See N. Y. Times p. 71 Jan. 2, 1957 "Court Jam Eased by Arbitration", Report of American Arbitration Association for 1956, indicating that it handled a record number of 2500 labor disputes over contract terms and 600 commercial cases during the year. In a study of collective bargaining agreements by the Bureau of Labor Statistics, nearly ninety per cent were found to contain arbitration clauses. See Nix, Theodore & Wolk, *Grievance Procedures in Union Contracts*, 1950-1951, 73 Monthly Lab. Rv. 36, 39 (1951); *Textile Workers Union of America v. Lincoln Mills of Alabama*, Brown J. (dissenting opinion), Transcript of Record p. 66-8, ftn. 14, at 66-7. A private survey by the Bureau of National Affairs in 1956 showed ninety-one per cent of the agreements surveyed provided for arbitration of some kind. *Collective Bargaining Negotiations and Contracts* 51:7.77:1.

unenforceable, though the court has jurisdiction and the Congressional purpose is to encourage such enforcement is to make mortmain the policy of the law and subvert the purposes of the statute. If a union which agrees not to strike in return for an agreement to arbitrate is denied specific enforcement of the promise to arbitrate, it may still be bound by the no strike clause, and liable in damages for its violation. The practical consequences of such a decision are that unions will reject both arbitration and no strike clauses and resort to their economic weapons in the absence of a *bona fide* facility for the peaceful settlement of disputes through arbitration. This is particularly true, if the arbitration clause, standing alone, constitutes a virtual no strike clause and the union can be held in damages for the consequences of a strike in violation of the arbitration clause alone: *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, 230 F.2d 526 (C.A. 1, 1956). This is contrary to the purpose and policy of the statute.

A second objection mentioned by petitioner and the Court below is that Sec. 301 lacks the procedural specifications needed for the power to compel arbitration (R. 73) and petitioner raises the spectre of judicial law-making in the field of labor arbitration (Br. p. 50). Historically, this objection comes too late. The courts have been engaged in extensive regulation of labor relations, including, incidentally, labor arbitration, for more than a decade, and have, under their general equity powers, been alert to adapt the remedies to the needs of the cases before them. See *Textile Workers Union v. Lincoln Mills of Alabama*, Brown, J. (dissenting opinion) No. 211, October Term 1956, pp. 64-65, 58-59; *N. L. R. B. v. Standard Oil Co.*, 196 F.2d 892 (C.A. 6, 1952); *Timken Roller Bearing Co. v. N. L. R. B.*, 161 F.2d 949 (C.A. 6, 1947); *N. L. R. B. v. Corsicana Cotton Mills*, 179 F.2d 234, 235; *Textile Workers Union v. Ameri-*

*can Thread Co.*, 113 F. Supp. 137; *Goodall Sanford Inc. v. United Textile Workers*, 131 F. Supp. 767; See *Texas & N.O. Ry. Co. v. Brotherhood*, 281 U.S. 548. "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And, it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. (citing cases)" *Bell v. Hood*, 327 U.S. 678.

Nor is a court the only source of a practical scheme (R. 73) to make arbitration effective. Employers and unions have devised and are quite capable of devising such methods for the settlement of their disputes. The facilities of the Federal Mediation and Conciliation Service, under Title II of the Act, are available, and the contract in the case at bar (Art. XIII 2, R. 33) is designed to use the facilities of that Service, in case the parties are unable to agree on the choice of an arbitrator. In the *Lincoln Mills* case, the contract provides for reference to the American Arbitration Association for assistance in the selection of an arbitrator, and makes the arbitration therein subject generally to the rules, regulations and procedures of that Association. (No. 211, October Term 1956, Transcript of Record, p. 17) In *Signal-Stat, Corp. v. United Electrical Radio and Machine Workers of America* (C.A. 2, 235 F.2d 298) the agreement provides for the arbitrators to be appointed by the New York State Board of Mediation. See also the procedure agreed upon in *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, 230 F.2d 526 C.A. 1; *Post Publishing Co. v. Cort*, 1956 Mass. A.S. 641, 134 N.E.2d 431.

Indeed, as petitioner itself suggests, the nature of labor arbitration is such that "certain legalistic features of the

Arbitration Act—such as the subpoena power, depositions, cross examination, etc.—are inappropriate to the purpose of a labor arbitration" (Br. p. 30).

Typically, a labor arbitration deals with wages, hours and working conditions, with contract provisions concerning seniority, layoffs, discharges, pensions, work loads, pay classifications and job descriptions, shop rules, vacation pay, call-in pay, and a variety of similar problems of day to day relations between the union and the employer under the contract. These are matters usually within the immediate knowledge of the parties, which they are required to consider in the grievance procedure before reaching the stage of arbitration.

The procedural provisions of the United States Arbitration Act are usually unnecessary in the arbitration of these matters. Labor arbitration is a method of handling grievances as a substitute for a strike, and not a substitute for litigation, although the ultimate right to compel the performance of the agreement to arbitrate and enforce the arbitration award is retained. But labor arbitration usually has no more need for subpoenas and interrogatories than commercial arbitration has for a four-step grievance procedure. The private and governmental facilities, to which most collective bargaining contracts refer, in their arbitration clauses, are of far more "practical" assistance in effectuating a safeguarded arbitration than a detailed legislative scheme. If a court under Section 301 can compel arbitration of a grievance under an agreement to arbitrate in a collective bargaining contract, in all likelihood the requirements for further formal proceedings in the arbitration proceeding itself cease to be of importance, particularly since a party may reserve his objections to the arbitrability of the grievance on the jurisdiction of the arbitration tribunal or other defenses appropriate to an action for enforcement of an arbitration award for ultimate decision.

by the Court, if he objects to the award. See *United Electrical, Radio and Machine Workers of America, Local 259 v. Worthington Corporation*, 236 F.2d 364 (1956).

These considerations make it plain, we submit, that the so-called "practical grounds" on which the Court below based its reluctance to employ Section 301 to enforce the agreement to arbitrate herein are not justified by the actual practice in labor management relations relating to arbitration under collective bargaining contracts.

*D. The District Court, with Jurisdiction Under Section 301, is Authorized to Grant Specific Performance on the Basis of Either Federal or Massachusetts Law.*

Whether the federal courts are granted jurisdiction, not based on diversity of citizenship, over a "contract governed entirely by state law" (*Association of Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 449) raises constitutional problems which are not present here. We are not dealing here with an individual contract of employment, or a State-created right which an employee and the Union could equally enforce, but with an arbitration clause in a collective bargaining contract made with a Union certified by the National Labor Relations Board as the exclusive representative of the production and maintenance employees of petitioner in an industry affecting commerce. This contract is governed in important respects by the Labor Management Relations Act of 1947. (See *International Brotherhood of Teamsters v. W. L. Mead Inc.*, 230 F.2d 536 (C.A. 1, 1956). The arbitration clause is linked with the no-strike clause (R. 33, 34) and the no-strike clause with the bargaining unit and recognition clauses (R. 10) all of which involve questions of interpretation under federal law. See *International Brotherhood v. W. L. Mead, Inc.*, supra. *Labor Board v. Lion Oil Co.*, 352 U.S. — January 27,

1957. The interpretation of these clauses or the contract as a whole or its breach may also be governed by state law, with respect to such matters as the parol evidence rule, rescission, and the like. If this were a suit by the Employer for damages for violation of the no-strike clause, it might become necessary to apply federal law with respect to some aspects of the contract and state law, with respect to others, for example, the duty to mitigate damages (*International Brotherhood v. W. L. Mead, Inc.*, *supra*). In this case, where the suit is for the specific performance of the agreement to arbitrate, the application of either state or federal law creates no conflict. As we point out more fully below, this contract is valid and creates rights under Massachusetts law. *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D.C. Mass.) and the Massachusetts courts, on the basis of recent decisions and legislative developments, have gone so far in expressing deference to federal policy favoring arbitration and in liberally construing the Massachusetts statute concerning the validity of arbitration agreements in collective bargaining contracts G. L. (Ter. Ed.) c. 150, Sec. 11 that there can be no doubt as to their hospitality to the remedy of specific performance as an appropriate remedy under Massachusetts law. (See IV *infra*) *Maglione v. Handschumacher*, 327 Mass. 569, *Sanford v. Boston Edison*, 316 Mass. 631, *Post Publishing Co. v. Cort*, 1956 Mass. A.S. 641, *Leonard v. Eastern Mass. Street Railways Inc.*, 1957 Mass. A.S. — January 21, 1957, Massachusetts law, however, does not permit an unincorporated association to sue in its own name *Tyler v. Boot & Shoe Workers Union*, 285 Mass. 54 (1933); *Donahue v. Kenney*, 327 Mass. 409 (1951). The present suit was commenced as a suit for violation of the arbitration clause seeking both damages and specific performance. It could not have been brought in the Massachusetts courts, with respect to the damage count, unless all the members of the

union were joined as parties plaintiff. *Sanford v. Boston Edison Co.*, supra.

These aspects of the law—state or federal—which may be applicable to a suit on the arbitration clause herein, demonstrate the necessity of furnishing a federal forum, as Section 301 does, for the protection of the federal labor policy, because of procedural difficulties in a state court, even where, as in Massachusetts, the same remedy may be granted under state law, as would be granted by the federal court. And, even if specific performance were not available under Massachusetts law, to enforce the substantive rights which are valid under Massachusetts law, "a federal court may afford an equitable remedy for a substantive right recognized by a state even though a State court cannot give it" *Guarantee Trust Co. v. York*, 326 U.S. 99. The exercise by the Congress of its "protective jurisdiction" is an appropriate grant of jurisdiction to the District Court to apply whatever law is available to protect the federal policy. See *International Brotherhood v. W. L. Mead, Inc.*, supra.

### III. THE COURT BELOW WAS CORRECT IN HOLDING THAT THE DISTRICT COURT HAD JURISDICTION UNDER SECTION 301 AND AUTHORITY UNDER THE UNITED STATES ARBITRATION ACT TO ENFORCE THE AGREEMENT TO ARBITRATE HEREIN.

The Court below held that the arbitration clause in the collective bargaining agreement herein is within the terms of Sec. 2 of the Act as "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." (R. 76) It also held that the exclusion in Sec. 1 of the Act ("but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class

of workers engaged in foreign or interstate commerce") does not embrace collective bargaining agreements; as distinguished from individual "contracts of employment" and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act. (R. 79) It finally held that the test of Sec. 4 of the Arbitration Act, authorizing specific enforcement of an agreement to arbitrate by a district court "which, save for such agreement, would have jurisdiction of the subject matter of a suit arising out of the controversy between the parties", is satisfied by the complaint in this case, which meets the terms of Sec. 301 itself, because the union here is asking for relief which the individual employee could not equally enforce in a suit on his personal cause of action. (R. 81)

*A. The Exclusion in Sec. 1 of the Arbitration Act of "Contracts of Employment" Does Not Apply to Collective Bargaining Contracts.*

Petitioner's first objection is that the exclusion of "contracts of employment" in Sec. 1 of the Arbitration Act applies to collective bargaining agreements. It supports this objection by an elaborate survey of the legislative history of the Act and its historical setting. Petitioner has misread history on both counts.

The legislation, as drafted and sponsored by the Committee on Commerce, Trade and Commercial Law<sup>2</sup> of the American Bar Association, was introduced in December 1922 as S. 4214 in the Senate and as H. R. 13522 (the "Mills Bill") in the House. 64 Cong. Rec. 732, 797 (1922) As it then stood, Sec. 1 of the bill defined "Maritime transactions" as including "seamen's wages, collisions, or any other matters in foreign or interstate commerce which, if the subject of controversy, would be embraced within ad-

miralty jurisdiction" and contained no exclusionary language. Sec. 2 provided that a written provision in any contract or maritime transaction or transaction involving commerce to settle a controversy by arbitration shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. At the 26th Annual convention of the International Seamen's Union of America, on January 13, 1923, the Union adopted an Analysis of the Mills Bill, submitted by its President, Andrew Furuseth, and, after discussion, a Resolution condemning the bill *Proceedings of the 26th Annual Convention of the International Seamen's Union of America* 83-87, 203 (1923).

The analysis,<sup>10</sup> resolution<sup>11</sup> and discussion<sup>12</sup> make it en-

<sup>10</sup> The Analysis states in part: "Let a clause to arbitrate be placed in any contract and any dispute about the meaning and enforcement of the contract must be referred to arbitration and the Court with all the Saxon rule of procedure and constitutional guarantees ceases to operate . . . The seamen having made contract to serve must serve. The railroad man having entered into a contract to serve with an arbitration clause therein must continue to serve; because such contract becomes through this law if enacted "Valid, enforceable, irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . Thus it seems certain that this bill provides for the re-introduction of forced or involuntary labor if the freeman through his necessities shall be induced to sign . . . The personal hunger of the seaman and the hunger of the wife and children of the railroadman will surely tempt them to sign and so with sundry other workers in "Interstate and Foreign Commerce" . . . With reference to the seamen, it will be an easy matter. Place in the contract to labor—the shipping articles—any rider not specifically prohibited by law, and the articles are loaded down with such already, and then at the end of the articles, a rider already rather usual, that any disagreement shall be arbitrated by the Shipping Commission (under existing statutes this includes consuls) and the seamen's right to wages, to food, to damages under the Jones Act together with his present right to quit work in harbor becomes void. With the seaman, the machinery is there and ready. The shipowner only needs this bill to become law and slavery is restored without any other noise, except such as the victim may make . . ." (*id* at 203-204)

<sup>11</sup> The Resolution, under the heading of "Compulsory Labor" stated in part: "Resolved: That any form of compulsory labor is destructive

tirely clear that the Union objected to the bill because it feared that seamen, railroad men and sundry other workers in interstate commerce would be induced or required to sign individual contracts of employment, with arbitration clauses, and that then the right of the individual workers to wages, to food, to damages under the Jones Act, and to quit work in harbor, would become void; and that if Unions signed an agreement containing an arbitration clause, it would merely be an added danger, since the result would be to bind the members.<sup>13</sup>

On January 31, 1923, Herbert Hoover, then Secretary

of fundamental American principles, in the fact that it denies the equal right of all men and that it recognizes and establishes bondage of one citizen to another . . . To use the necessities of men as in H. R. 13522 whether such necessities be individual or arising out of family relations, is especially reprehensible, because it makes need, hunger and want the basis of contracts which the American sovereign may legally be able to make and which a misused equity power will enforce; but which is an abdication of such sovereignty for the purpose of obtaining bread for self or family and further be it

"Resolved, That we condemn any policy, be it of a State or National scope, the purpose of which is to create bondage in any form for any purpose, except as a punishment for crime." (*id* at pp. 83-84)

<sup>12</sup> In urging the adoption of the recommendation of the Committee, President Furuseth said in part: "Now you are to think over this thing, particularly with reference to the riders in the articles and with reference to the rider that the Shipping Commissioners shall be the final arbiters . . .". (*Id* at p. 89)

<sup>13</sup> "So far we have dealt with the individual. What about those who seek to protect themselves through mutual aid? Some organizations are very strong in their cohesiveness. Cannot those individuals save not only the individuals, but themselves? The Supreme Court has decided that voluntary organizations may be sued. If they shall enter into an agreement containing an arbitration clause, there can be little doubt that the organization will be bound. But would such action bind the members? The hatters case and the Coronado case seem to answer this question; but aside from these cases, does not the principle of the corporation law (excluding limitation of liability) apply? Would it not be held that the members are the stockholders, the convention the meeting of the stockholders, and that the Executive Board is the Board of Directors. And if such should be the decision of the Court (and we have seen something more remarkable than this would be), then organization would be an added danger." (*id.* at 204).

of Commerce, addressed a letter to Senator Sterling, Chairman of a subcommittee of the Committee on the Judiciary, to which S. 4214 had been referred, urging the enactment of the bill, and adding

"If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate or foreign commerce' ". *Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate* 67th Congress, Fourth Session on S. 4213 and S. 4214, January 31, 1923, p. 14.

It will be noted that the exclusionary language suggested precisely parallels the objection made by President Furuseth that the bill would apply to the individual contracts of employment of the "seaman . . . the railroadman, and sundry other workers in Interstate and Foreign Commerce" *Proceedings of the 26th Annual Convention of the International Seaman's Union* (1923) pp. 203-204.

On the same day, January 31, 1923, a hearing was held before the sub-committee of the Senate Committee on the Judiciary, at which a Mr. Piatt, chairman of the Committee on Commerce, Trade and Commercial Law of the American Bar Association, testified in support of the bill. In the course of his testimony, he stated to Senator Sterling:

" . . . but there is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head or whatever he is of that part of the labor union that has to do with the ocean—the seamen—

Senator Sterling: Mr. Furuseth?

Mr. Piatt: Yes, some such name as that. He has

objected to it and criticized it on the ground that the bill in its present form would affect, in fact, compel arbitration of the matters of agreement between the stevedores and their employers. Now it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense, and so I suggest that insofar as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language 'but nothing herein contained shall apply to seamen or any class of workers engaged in interstate and foreign commerce'. It is not intended that this shall be an act referring to labor disputes at all."

(Hearings on S. 4213 and S. 4214, *supra*, p. 9)

Petitioner makes much of Mr. Piatt's statements that the bill was not intended to make an industrial arbitration or to refer to labor disputes at all (Br. 16-17) and to the casual remark of Senator Sterling, in discussing architects' and railroad construction contracts containing arbitration clauses, which the successful bidder would be required to take, as is, whether he wished the arbitration clause or not:

"Let me suggest the question as to whether you have already covered that in a way and by your suggested amendment in regard to the labor associations; that they shall not be considered." (*id.* at p. 10)

These statements do not alter the clear intent of the suggested amendment which was to eliminate the application of the Act to individual contracts of employment of seamen and others, on the basis of Furuseth's analysis. Labor disputes and industrial arbitration do not necessarily mean disputes between unions and employers; they are

wholly consistent, in the context, with the disputes, referred to by the Seaman's Union, over the content of individual contracts of employment (cf. Norris-LaGuardia Act 29 U.S.C. Sec. 113) and so is Senator Sterling's remark about the amendment suggested to take care of the objection raised by a labor association.

In any event, the Report of the Committee on Commerce, Trade and Commercial Law of the American Bar Association, following this hearing, made it quite clear that the proposed amendment was designed to overcome the objection based on the inclusion of agreements to arbitrate individual contracts of employment. It stated

"Objections to the Bill were urged by Mr. Andrew Furuseth as representing the Seaman's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: '(the present exclusionary language of Sec. 1 of the Act) 48 A.B.A. Repts. pp. 286-287 (1923)'<sup>14</sup>

The bill was reintroduced in the next session of Congress

<sup>14</sup> The Executive Council of the American Federation of Labor, in a sentence from its report which Petitioner omits (Br. p. 19) stated "The bill as originally presented appeared dangerous to seamen and other wage workers employed in the maritime service. Protests from the American Federation of Labor brought about an amendment . . ." (Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925)).

To the same effect, see "The Commercial Arbitration Law" 9 A.B.A. Journal 523, 525, August, 1923. "The bill providing for arbitration in the federal courts was amended at the instance of the Representatives of the Seamen's Union who did not wish seamen's wages to be subject to compulsory arbitration. There was added to the bill to take care of this condition" (the present exclusionary language of Sec. 1).

(68th Cong. 1st Sess.) as S. 1005 and H.R. 646. The definitions in Sec. 1 now omitted reference to "seamen's wages" which had been included in the prior bill and added the present exclusionary language. It will be observed that the elimination of "seaman's wages" alone from Section 1 would not have overcome the objections of the Union to the bill since the bill also defined "maritime transactions" as including "any other matter in foreign commerce which is the subject of controversy would be embraced within admiralty jurisdiction". To meet the objection that the bill would deprive individual seamen of their right to quit work in harbor, to food, to the protection of the Jones Act and other matters within admiralty jurisdiction—matters which were the subject of the Union resolution, discussion and analysis—it was necessary also to amend the bill to except from its coverage the contracts of individual hire, so that those personal rights of individual employees would be protected against the threat of compulsory arbitration. The bill was enacted with amendments not pertinent here, without opposition, and with no further reference to the exclusionary language or seamen's wages. *Joint Hearings Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 1st sess. on S. 1005 and H. R. 646; House Rept. No. 96, 68th Cong. 1st sess.; Sen. Rept. No. 536, 68th Cong. 1st sess.

In the light of this legislative history, there is no warrant for petitioner's argument that contracts of employment of seamen, railroad workers and other classes of employees in interstate or foreign commerce means collective bargaining agreements of labor organizations. The evil to which the Seamen's Union objected was primarily the danger to seamen, railroadmen, and sundry other workers in interstate or foreign commerce if arbitration clauses were included in the written shipping articles or other individual contracts of employment. Secretary Hoover referred to the

objection based on "workers' contracts" as the basis for the amendment overcoming opposition to the bill. Mr. Piatt mentioned agreements between "stevedores and their employers". The Report of the Committee on Commerce, Trade and Commercial Legislation of the American Bar Association and the Bar Association Journal stated that, the amendment was to overcome the objection based on compulsory arbitration of seamen's wages, and the Executive Council of the American Federation made its objection on the basis of danger to seamen and other wage workers. None of these—neither those who drafted and sponsored the bill nor those who objected to it—ever referred to collective bargaining agreements as affected or imperilled by the legislation, and the only reference to arbitration clauses in collective bargaining agreements came about when Furuseth argued that if such agreements were to include arbitration clauses, it would be an added danger, since it would bind the individual members.

Petitioner asserts that three of the International Seamen's Union's largest districts had collective agreements containing arbitration clauses and argues that the Union's opposition to the Act rested upon its possible effect on those arbitration clauses. (Br. pp. 13-14)

The agreements which petitioner cites are neither collective bargaining contracts, nor do they contain arbitration clauses. They are Agreements effective May 1920 to May 1921 between the United States Shipping Board; the Unions and the American Steamship Owners Association, for Wage Scales and Working Conditions, which were the outgrowth of the Atlantic War Agreement. These matters were subject to the approval of the United States Shipping Board, which fixed all rates of pay and determined working conditions. See *International Seamen's Union of America, a Study of its History and Problems*. U. S. Dept. of Labor, Bureau of Labor Statistics (June 1923) p. 57-59. *Proceedings of the 24th Annual Convention*

of the International Seamen's Union App. C, D and E., pp. 186, 190, 191. These agreements contained a clause for "a grievance committee to interpret the agreements and to prevent small but troublesome misunderstandings" (*International Seamen's Union of America, a Study of its History and Problems*, p. 58.) The Committee was composed of three representatives of the Union, and three representatives of the Steamship Owners Association, (See *Proceedings of the 24th Annual Convention of the International Seamen's Union*, pp. 176-187, 190, 193), with the Vice President and General Manager of the Association, (*id.* p. 136, *Proceedings of the 25th Annual Convention*, p. 274) as Chairman. Arbitration is not mentioned nor was any procedure for arbitration provided in these clauses.

After 1921-1922, these agreements were not renewed, and collective bargaining for all practical purposes disappeared. *Written Trade Agreements in Collective Bargaining*, Ch. IX; *The Maritime Industry*, pp. 136-137, *National Labor Relations Board Division of Economic Research Bulletin No. 4*; November, 1939. There is thus no basis for petitioner's assertion that the Union's objections were motivated by any apprehension of being compelled to arbitrate, under the arbitration clauses in their collective bargaining contracts. They had no such agreements containing such clauses and, so far as Furuseth's analysis of arbitration clauses in such contracts indicates, the Union was opposed to including arbitration clauses in their contracts.

Petitioner also argues that to limit the exclusionary clause to individual contracts of employment strips it of practical significance, since only written provisions to arbitrate are within the Act and such written provisions were in 1925 and are now found not in individual contracts of employment, but in collective bargaining agreements. (Br. p. 24) This argument, for which no authority whatsoever is given, overlooks the fact that seamen are required to

sign individual contracts of employment in the form of shipping articles<sup>15</sup> and at and before the time of the Arbitration Act, were required to carry continuous discharge or grade books. See 46 U.S.C. 563, 564, 643(g) (j), 651. See *Robertson v. Baldwin*, 165 U.S. 287; *International Seamen's Union of America*; op. cit. pp. 31, 35; Norris, *The Law of Seamen*, p. 113.

At the time of the enactment of the Arbitration Act, the distinction between individual contracts of employment and collective bargaining agreements was well known. Written anti-union or "yellow dog" individual contracts of employment were prevalent in a number of industries and the question of their enforcement was an issue of public debate. In the same way, the trade agreements or union management collective bargaining contracts were well known. See Cox, *Cases on Labor Law* (1948) *Historical Introduction*, pp. 95-96; *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229 (1917) dissenting opinion Brandeis, J.; *Int'l. Organization U. M. W. A. v. Red Jacket Cousal Coal and Coke Co.*, 18 F.2d 839 (C.A. 4) 1927.

The historical setting indicates that had Congress intended to exclude collective bargaining agreements, it would not have employed the words "contract of employment". The legislative history amply demonstrates that the exclusionary language was aimed at the exclusion of contracts for personal service.

#### *B. The exclusion in Sec. 1 of the Arbitration Act does not apply to the contract of the production and maintenance employees herein.*

In any event, the employees here involved are production and maintenance employees engaged in manufacturing in an

<sup>15</sup> A typical clause in the Shipping Articles of the 1920s required that all questions between individual seamen and the Master of the vessel be heard and decided by the shipping commissioner or consul who was empowered to make a binding award. See *Proceedings 24th Annual Convention International Seamen's Union*, pp. 25-26.

industry affecting commerce (R. 10) and not "seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce". If "contract of employment" is to be read as including collective bargaining contracts, because of the historical setting in 1925 in which the term was used (Br. p. 12), then the coverage of the act and the employees as to whom it was to be made applicable should be read in the same setting. So read, it does not cover the contract of the production and maintenance workers in this case, since they are not engaged in interstate commerce.

If the decision of the Court below and of the Sixth Circuit<sup>16</sup> as to the meaning of "contract of employment" is rejected, then the decisions of the Second and Third Circuit,<sup>17</sup> which embody the foregoing rationale, should be followed. The legislative history strongly suggests that "the seaman, the railroadman and sundry other workers in interstate and foreign commerce" were the employees to be excluded from the Act, and that the coverage of the Act under the prevailing view of the commerce power was limited to such employees.

### *C. Section 2 of the Arbitration Act Applies to Collective Bargain Contracts.*

Petitioner's objection to the holding of the Court below on this score is that the legislative history of the Act shows that it was intended to apply solely to commercial contracts and to have no application to collective bargaining contracts. (Br. pp. 25-26) It may well be, as the Court below

<sup>16</sup> *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49 (C.A. 6, 1954); *Local 19, Warehouse Workers Union v. Buckeye Cotton Oil Co.*, 236 F.2d 776 (C.A. 6, 1956).

<sup>17</sup> *Signal Stat. Corp. v. United Electrical Radio and Machine Workers*, 235 F.2d 298 (C.A. 2, 1956); *Tenney Engineering Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (C.A. 3, 1953).

agreed, that the attention of Congress was focussed on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration, but it by no means follows that only certain kinds of contracts evidencing transactions involving interstate commerce were brought within the scope of the Act. No apt language was used in Sec. 2 to circumscribe its scope. On the contrary, Sec. 2 was regarded as adopting a rule of law which would make all such contracts valid, irrevocable and enforceable, to overcome the "anachronism" of the common law in holding such contracts unenforceable. (See H. Rept. No. 96, 68th Cong. 1st Session) and H. R. Rept. No. 96, 68th Cong. 1st Session states that one foundation of the new regulatory measure is "the Federal control over interstate commerce and over admiralty" (p. 1) *Bernhardt v. Polygraphic Co.*, 350 U.S. at 201-202. A construction which accords a broader effect to the words "transaction involving commerce" than to the words "workers engaged in . . . commerce" not only avoids "a grudging type of construction carried down from the days of judicial hostility to all arbitration agreements". It also carries out what appears to be the intent of Congress to make Sec. 2 apply to all contracts within its power to regulate under the commerce power. Such an interpretation as applied to collective bargaining contracts would effectuate the federal labor policy to encourage arbitration, as expressed in the Norris La Guardia Act, the Labor Management Relations Act of 1947 and other federal labor laws. See *United Office Workers v. Monumental Life Ins. Co.*, 88 F. Supp. 602, 607 (D.C. ED, Pa. 1950).

*D. The District Court Had Jurisdiction Under Section 501 of the Labor Management Relations Act and Section 4 of the Arbitration Act to Compel Specific Performance of the Agreement to Arbitrate Herein.*

Petitioner seeks to overturn the holding of the Court below to this effect on the ground that Section 4 of the Arbitration Act requires that the District Court's jurisdiction must be founded on Title 28; and the complaint herein (excluding the claim of diversity jurisdiction) is founded on Title 29 U. S. C. Sec. 185. (Br. pp. 32-33). As to the formal aspect of this argument, it is sufficient to point out that in codifying this section of the law, the House Judiciary Committee specifically disclaimed any intention to change existing law, H.R. Rep. No. 255 80th Cong. 1st sess. (1947), and prior law conferred jurisdiction "under the judicial code at law; in equity or in admiralty". See *Murphy, The Enforcement of Grievance Arbitration Provisions*, 23 Tenn. L. Rev. 959-971 (1955); *Sturges and Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act 17 Law and Contemporary Problems*, 580 ftn. 1, 615-616 ftn. 80. (1952); *Cox, Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 595 ftn. 12 (1954).

Petitioner argues that jurisdiction under Title 28 cannot be supported on the theory that the case "arises under the Constitution, laws or treaties of the United States" within the meaning of Section 1331 of Title 28, because Sec. 4 of the Arbitration Act requires jurisdiction to be tested as if no arbitration agreement had existed and the underlying controversy which the Union seeks to arbitrate relates only to rights created by and arising out of the contract, not out of federal law. (Br. 32-35)

The Court below met this argument by holding that the effect of the *Westinghouse* decision was to eliminate from

Sec. 301 jurisdiction a complaint by a union that involves no more than a cause of action which the individual employee has equal power to enforce, but to leave within Sec. 301 jurisdiction a cause of action or remedy that appropriately pertains to the union as entity, particularly one which an individual employee may have no equal power to enforce (R. 80). It held, therefore, that the test of Sec. 4 will be satisfied by a complaint which, as in the case at bar, meets the terms of Sec. 301 itself. Since jurisdiction is conferred on the District Court by Sec. 301 and not by the agreement to arbitrate, the holding of the Court below is amply justified.

This is not a case where the District Court is given jurisdiction by the terms of the agreement to arbitrate itself, or where an executory agreement to arbitrate is made a rule of court. In such circumstances, absent any other jurisdictional basis, the District Court would not have jurisdiction under Section 4. Nor is this a case where the mere agreement to arbitrate is asserted as a ground of jurisdiction under Section 4. If a suit for violation of a collective bargaining contract, containing an agreement to arbitrate, were between an employer and a labor organization, but not in an industry affecting commerce, the District Court, absent diversity or other jurisdictional grounds, (but see *Bernhardt v. Polygraphic Co.*, supra) would not have jurisdiction under Section 4. And if the agreement to arbitrate did not relate or was not limited to controversies "arising out of" such collective bargaining contract in an industry affecting commerce, it may be that, absent other jurisdictional grounds, the District Court would have no jurisdiction (See R. 76). The jurisdiction of the District Court here arises not because of the agreement to arbitrate, but because Congress has in Section 301 granted the District Court jurisdiction over suits for violations of contract between parties in an industry affecting commerce, including

contracts which embody agreements to arbitrate; Section 2 of the Arbitration Act is a federal law which make such agreements valid, irrevocable and enforceable; and Title 28 U. S. C. Sections 1331 and 1337 confer federal question jurisdiction over the subject matter of the suit arising out of the controversy between the parties. Under the authority of these statutes, and not the agreement to arbitrate, the District Court has jurisdiction, under Section 4 of the Arbitration Act, to grant the remedy of specific performance.

Moreover, the Boardi grievance involves the question of whether the company violated its promise, which runs only to the Union, to turn over to the Union a complete list of job classifications and rate ranges. (R. 44) This is a matter in which the Union's interest is sufficient to justify a cause of action under Sec. 301 (See *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (C.A. 3, 1956)). While the underlying controversy in the Armstrong grievance involved a discharge, and so might be deemed an individual cause of action under the "eclectic theory," 348 U.S. at 457-8, it involves the interpretation of the contract term "discharge for cause", in which the Union has an interest, *qua* union, for the protection of all employees and not merely Armstrong.<sup>18</sup> (R. 45-46). In either case, individual

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<sup>18</sup> "It is common to include (in management right clauses) the right to suspend and discharge for "just cause", "proper cause", "obvious cause" or quite commonly for "cause". There is no significant difference between these phrases. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day to day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of common law that may be regarded as the latest development of the law of "master and servant" or perhaps more properly as a part of a new body of common law of "management and labor under collective bargaining contracts . . . It is immaterial how the Company's action is characterized, since, in any case, the dispute is as to the interpretation of the phrase 'discharge for proper cause'. An issue as to the meaning of a term in a contract is clearly

employees could not enforce the right, in most jurisdictions, unless the remedy of arbitration had first been exhausted by the Union. See *Cox: Rights Under a Labor Agreement* 69 Harv. L. Rev. 601, 647-652 (1956); *Snay v. Lorety*, 276 Mass. 159.

*E. Section 2 of the Arbitration Act Authorizes the Specific Enforcement of the Agreement to Arbitrate Herein.*

In a suit under Section 301 for violation of the agreement to arbitrate, which only the Union can enforce, Section 2 of the Arbitration Act is itself sufficient authority for the remedy of specific enforcement, if, as we submit, it applies to collective bargaining contracts, and such contracts are not excluded by the excepting clause of Section 1. Such authority can be invoked if for any reason Section 4 of the Arbitration Act is deemed inapplicable. The objection that Section 301 is procedural only and confers no substantive rights, would obviously be met, if Section 301 had expressly included the language comparable to that of Section 2 of the Arbitration Act, that agreements to arbitrate in collective bargaining contracts in an industry affecting commerce shall be valid, irrevocable and enforceable. No greater difficulty exists because the authority appears in a separate enactment. Whether viewed as a mere form procedure within the power of a federal court or a substantive right granted by a federal statute, see *Bernhardt v. Polygraphic Co.*, 350 U.S. 202, the federal district court having power, under Section 301, is authorized to use a federal remedy to effectuate a federal policy. Such a remedy is authorized by Section 2 in general terms, although the scheme of the Act contemplated that the de-

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arbitrable." *In the Matter of Worthington Corp.*, 24 L.A. 1. See *Local 259, United Electrical Radio and Machine Workers of America v. Worthington Corp.*, 236 F.2d 364 (C.A. 1, 1956).

tailed procedures would be afforded by Section 4. But Section 4 is not in terms an exclusive procedure, and no reason in the language of that Act or in federal policy requires its interpretation as exclusive. Where jurisdiction is separately conferred by Section 301, Section 4 is merely an alternative procedure for granting the remedies authorized by Section 2 and Section 2 is properly invoked, when Section 4 is inapplicable.

#### **IV. THE DISTRICT COURT HAS JURISDICTION UNDER TITLE 28 U. S. C., SEC. 1332 (a) (1) TO DECREE SPECIFIC PER- FORMANCE OF THE AGREEMENT TO ARBITRATE HEREIN.**

The amended complaint alleges that the plaintiff union maintains its principal office in Ashland, Massachusetts, where its officers and agents are engaged in representing and acting for employee members; that defendant is a corporation organized under and by virtue of the laws of the State of New York; that the matter in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs; that plaintiff has no adequate remedy at law; that plaintiff will be subject to irreparable damage unless granted the relief requested; and that the action arises under the provisions of Section 301 (a), 301 (b) and 301 (c) of the Labor Management Relations Act of 1947. (R. 42, 43, 55-56)

In the Court of Appeals, plaintiff moved, under Title 28 U. S. C. Section 1633 to amend its complaint to allege diversity of citizenship between all the members of the Union and defendant and jurisdiction under Title 28 U. S. C. 1332 (a) (2) and supported this by an affidavit of the Business Agent of the Union, which was not controverted (R. 57-58). The Court below denied the motion on the ground that "it may have become moot but it must in any event be denied, for it cannot accomplish the result intended" citing Rule 17(b) F. R. C. P. and cases which hold

that under Massachusetts law a Union does not have capacity to sue as an entity. (R. 82)

Since our argument, on the basis of diversity jurisdiction, supports rather than seeks to overturn the judgment of the Court below, even though it was rejected by that Court, and since both parties have briefed the question in the Court below (R. 69) and in this Court in the *certiorari* proceedings (Brief for Respondent in Opposition pp. 13-14; Reply Memorandum for Petitioner p. 4) and petitioner has argued the matter in its main brief (Br. pp. 34-35), we are entitled to urge that argument now, *Langnes v. Green*, 282 U.S. 531, 535-539; *Walling v. General Industries Co.*, 330 U.S. 545, 547.

The Court below erred in denying the proposed amendment.

*A. The Union Had Capacity to Sue as an Entity Under Rule 17(b) of the Federal Rules of Civil Procedure and Without Regard to its Capacity Under Massachusetts Law.*

The legislative history of Section 301(b) indicates that it was intended not merely as applicable to suits under Section 301(a) but as a general competency statute. The Conference Committee Report states that

"This subsection and the succeeding subsections of Section 301 of the conference agreement (as was the case in the House bill and also in the Senate amendment) are general in their application, as distinguished from subsection (a)" *H. Conf. Rept. No. 510 on H. R. 3020*, 80th Cong. 1st sess. p. 66.

The text of the statute carries out this intention. While Section 301(e) limits the applicability of that subsection 301, Sections 301(b) to (d) are phrased in terms of general

application. Had Congress any intention of limiting Section 301(b) to Section 301 actions, it would have said so, as it did with respect to Section 301(e). Its failure to do so confirms the statement in the Conference Report, that Section 301(b) was intended to be of general application and thus a simple extension of Rule 17(b).

The decisions of those courts which have considered the matter support this view. Thus, in *Rock Drilling Local Union No. 17 v. Mason & Hanger Co., Inc.*, 90 F. Supp. 539 (S.D. N.Y. 1950, aff'd 217 F.2d (C.A. 2, 1954) cert. den. 349 U.S. 915 (1955)), a tort action brought by a labor union, the District Court held that, while Section 301 (b) does not enlarge the jurisdiction of the federal courts, unlike Section 301(a) its application is not limited to suits for violation of collective bargain contracts:

"It is a capacity provision applicable generally, which is a simple extension of Rule 17(b) F. R. C. P. under which the right of an unincorporated association to sue in its common name is limited to cases involving federal rights." (at 542)

The Court of Appeals in the same case agreed:

"The capacity statute, applicable generally to all suits by or against labor unions, is contained in Section 301(b) (at 691-692) . . . (Congress gave) to such organizations generally the capacity to sue or be sued in the federal courts, as provided in Section 301(b). The portion of Section 301(b) relied on by plaintiff is a capacity statute pure and simple and goes no further. *Amazon Cotton Mills v. Textile Workers Union*, 167 F.2d 183, 187-188 (4th Cir. 1948)". See *Milk Drivers Union v. Gillespie Milk Products*, 203 F.2d 650 (C.A. 6).

In *United Electrical Radio and Machine Workers of America, Local 259 v. Worthington Corp.*, 236 F.2d 364 (C.A. 1, 1956), the Court below on allegations with respect to the plaintiff union, and its members, identical with those in the case at bar held, without adverting to Section 301(b), that "On the record before us, taking into account the citizenship of the individual plaintiffs and of the members of the plaintiff union, it seems that there is diversity jurisdiction as to all parties and also federal jurisdiction under Section 301 of the Taft Hartley Act as to plaintiff union alone." (at 371)

Moreover, in the *Westinghouse* case, 348 U.S. 437, we are told that all that Section 301 does is to give procedural directions to the federal courts. "When an unincorporated association which happens to be a labor union appears before you as a litigant in a case involving a breach of a collective agreement, 'Congress in effect told the District Courts,' treat it as though it were a natural or corporate person and do so regardless of the amount in controversy and do not require diversity of citizenship." (Frankfurter, J. at 443) These directions are separable, and no greater difficulty arises in accepting the first part, than arises in accepting the whole. Thus, treating Section 301(b) as a simple capacity statute, it applies where, as here, a basis of jurisdiction is present, although not required by Section 301(a).

This view of Section 301(b) creates no constitutional problem under the *Westinghouse* decision, since it does not seek to expand federal jurisdiction, nor under *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) or *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1955), since the question of competency is merely a procedural matter that does not affect rights created under applicable state law. Here, the question is not of the very existence of the right, but of the capacity of the party to sue on the basis of an existing right.

The question of the suability of a trade union "is after all in essence and principle merely a procedural matter" *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 390 (1922).

In this view, the effect of Section 301(b) is to extend or amend Rule 17(b) by giving capacity to the union as an entity, in a suit where the court has diversity jurisdiction and state law is applied. "Where federal policy has been formulated to an extent sufficient to warrant inclusion in the federal rules, (to employ a federal rule) would clearly not be inconsistent with the *Erie* case itself, since underlying obligations created by the state would be enforced according to state law. No federal rule has ever been declared invalid by the Court because of inconsistency with the *Erie* doctrine. *Kaplan, Suits Against Unincorporated Associations under the Federal Rules of Civil Procedure*, 53 Mich. L. Rev. 945 (1955).

The same result is reached if Section 301 is held to create a federal substantive right, but this right is defined by incorporating state substantive law as a part of the federal substantive law (See Reed, J. concurring and Black and Douglass JJ. dissenting in *Association of Employees v. Westinghouse Electric Corp.*, 348 U.S. at 462-463, 465. On this basis, the rights are truly federal, not state, and an unincorporated association may thus sue in its common name to enforce that federal substantive right under Rule 17(b) F. R. C. P. and § 301(b)). Or § 301 itself may serve as a substantive right giving the union capacity to sue under Rule 17(b). "For all that can be derived from legislative history, Section 301 may merely have been intended as a direction to district courts to treat unions as falling within the second clause of Rule 17(b). . . . Congress seems to have so loosely employed the term substantive right that it may have intended Section 301 to serve as the substantive right existing under the . . . laws

of the United States described in rule 17(b). 'Law' encompasses both substantive and procedural provisions and 'substantive right' may be considered merely as capacity to sue" (*Mendelsohn, Enforceability of Arbitration Agreements under Taft Hartley Section 301.* 66 Yale L. J. 191-192, footnotes omitted (1956)).

**B. The Union and All Its Members are Diverse in Citizenship from Petitioner.**

Under any of the foregoing views the union has capacity to sue as an entity. If its citizenship is established for diversity of purposes, like that of a corporation, by the venue and jurisdictional tests of Section 301, i.e. in the district where it maintains its principal office or where its duly authorized officers or agents are engaged in representing or acting for employee members (Section 301(e)), diversity jurisdiction is established without more. The union maintains its principal office and represents employees in Massachusetts; petitioner is a New York corporation. If the conventional test is applied,—the diversity of the citizenship of the individual members of the unincorporated association (see *Levering & Garrigues v. Morrin*, 61 F.2d 115, 117, 118 (C.A. 1932), aff'd 289 U.S. 103 (1933)),—the affidavit of the Business Agent of the union and the proposed amendment to the amended complaint (R. 57-58) meet that test. All the members of the union are citizens of Massachusetts, Rhode Island and New Hampshire, none are citizens of New York.

*C. The Matter in Controversy Exceeds \$3,000.00*

The required jurisdictional amount is alleged in the motion to amend the amended complaint (R. 55-56) which was allowed (R. 56). The petitioner had earlier filed its answer to the amended complaint, which did not contain any allegation as to the jurisdictional amount (R. 42, 47) and no answer was filed to the amended complaint as amended because of the dismissal of the suit by the District Court, on petitioner's motion to strike request for specific performance (R. 47, 53, 55-56). Any challenge to this jurisdictional amount, now, before answer and before proof is had of the amount in controversy, would be premature. *McNutt v. General Acceptance Corp.*, 298 U.S. 178, *Bell v. Preferred Life Assurance Society*, 320 U.S. 238. In any event, the value of the right which the Union seeks to protect, the object of the suit and the matter in controversy, is the right to compel specific performance of the agreement to arbitrate, and particularly in this case, during the life of its contract, i.e. from at least April 1954 to date. If the measure of the value of the right is the value of the contract with and without an enforceable arbitration clause, or the cost to the Union in calling a strike to settle grievances which petitioner refuses to arbitrate, or the cost to the Union in seeking to enforce the agreement herein or any other principle is applied which measures the loss to the Union in dues or otherwise from interference with its right to have these or any other grievances arbitrated, it is clear that the allegation on its face is stated in good faith, without manifest error in law, and that the matter in controversy may reasonably be found to exceed \$3,000.00. In advance of trial and proof on the matter, it is thus not apparent to a legal certainty that the value of the right does not exceed \$3,000.00.

*D. The Estimate is Fully Warranted that Under Massachusetts Law Agreements to Arbitrate in Collective Bargaining Contracts are Specifically Enforceable.*

If the *Erie*, *York* and *Bernhardt* decisions require state law to be applied in a case involving a suit for specific performance of an agreement to arbitrate in a collective bargaining contract in an industry affecting commerce, where diversity jurisdiction is asserted, the applicable state law, here Massachusetts law, authorizes that remedy.

1. Massachusetts law relating to specific performance of agreements to arbitrate in collective bargaining contracts.

In Massachusetts, the law governing agreements to arbitrate has developed from early decisions at common law that such agreements were invalid and unenforceable, through a series of enactments, to decisions that such agreements are valid, and, in certain circumstances may be specifically enforced. Moreover, in two recent cases, decided since the decision of the Court of Appeals in the case at bar, the Supreme Judicial Court has exhibited an unmistakable hospitality to the remedy of specific enforcement of such agreements in typical collective bargaining contracts, although on the facts in each case, the Court found it unnecessary to apply the remedy. Paralleling this course of judicial decision under existing statutes, recent legislative developments are underway which, if enacted, will remove all doubt as to the availability of the remedy in such cases, and wholly undermine the original judicial rule.

At common law, in Massachusetts such provisions for arbitration were not valid *Sanford v. Boston Edison Co.*, 316 Mass. 631, 636, 56 N.E. 2d 1, 4 (citing cases). See Rule 92, Superior Court Rules 1932 Annotated (1932). A lim-

ited statutory provision for the enforcement of agreements to submit to arbitration controversies thereafter arising under a contract was enacted in 1925 (G. L. C. 251, as amended by St. 1925-C. 294; G. L. (Ter. Ed.) C. 251, Secs. 14-22). In the *Sanford* case, *supra*, the Court held that a union's right to specific enforcement of a union check off agreement in a collective bargaining contract could not be defeated by a requirement that it submit the matter to arbitration, since the arbitration provisions in the contract were not valid at common law and were so comprehensive as not to fall within the limited provisions of the statutory grant. In 1949, however, a broad arbitration statute was enacted, providing for voluntary arbitration in labor disputes by the Board of Conciliation and Arbitration of the Department of Labor and Industries and for private arbitration. (Mass. G. L. (Ter. Ed.) C. 150, Secs. 1, 5, 6, 11). Section 11 provides "All provisions of collective bargaining agreements relating to arbitration and conciliation before public or private arbitration and conciliation tribunals shall be valid, and if the parties to such agreements agree that the determination of the tribunal on any issue shall be final, such determination shall be deemed final and shall be enforceable by proper judicial proceedings." In *Magliozzi v. Handschumacher*, 327 Mass. 569 (1951) the union brought a suit for specific performance of an arbitration award and for the reinstatement of an employee. The Court rejected the contention that "proper judicial proceedings" for an award of money can only mean actions at law. It held:

"This overlooks both the nature of the contract and the purpose of the statute. The contract purports to afford a prompt and peaceful settlement of labor disputes, in part by resort to arbitration. The present arbitration was brought about in an attempt to determine the seniority rights of the plaintiff Hyde, and resulted in what we hold

to be a valid arbitration award. If the equitable remedy should be ruled to be unavailable to the plaintiff, the alternative could be strife or delay attending a strike or the outcome of successive actions at law to recover the sum of not more than \$52.00 weekly. Such a restricted interpretation of the legislative intent would not be reasonable. Moreover, the Legislature must have known that in an action at law all the members of the Local and International would be necessary parties." (*id* at p. 573)

At the time of the Court of Appeals decision in the case at bar, the *Sanford* and *Magliozi* cases, which it cited, were the only labor cases decided under the 1925 and 1949 statutes, as they were in 1953 when the United States District Court for Massachusetts (Wyzanski, J.) construed the statute as validating a similar contract to arbitrate and as creating rights in the parties (*Textile Workers v. American Thread Co.*, 113 F. Supp. 137, 1953). The Court of Appeals observed, however, that "In Massachusetts, it is not at all clear what is the present status of such enforcement" (R. 72-73).

Just three weeks after the decision of the Court of Appeals, the Supreme Judicial Court handed down its decision in *Post Publishing Co. v. Cort*, 1956 Mass. A. S. 641, 134 N.E. 2d 431. The employer there had sought a bill in equity against the representatives of the Union and the American Arbitration Association to enjoin arbitration of the claims of certain employees under a collective bargaining contract. The Court affirmed a decree of the lower court refusing to enjoin the arbitration. As against the contention that the claims were within the exclusive jurisdiction of the National Labor Relations Board, the Court said

"And in the absence of a clear expression of Congressional intent, we shall not assume a lead in rendering largely useless a common method of expediting

settlement of a labor controversy and a method which is approved in a congressional declaration of policy.

... We cannot believe that Congress intended to create a no-man's land where voluntary arbitration is barred and the National Labor Relations Board may be too over-burdened to enter. There must be a penumbra zone where an initial tribunal selected by the parties may be permitted to reduce controversies in both number and scope prior to resort to an administrative or judicial tribunal. . . . Here arbitration should at least be allowed to sweep away grounds of dispute which are not within any pre-empted field."

In its most recent decision (*Leonard v. Eastern Massachusetts Street Railway Co.*, 1957 Mass. A.S. — January 21, 1957) in a suit on an agreement to arbitrate in a collective bargaining contract, the Court issued a decree declaring the obligations under the contract, that the Union, upon compliance with certain procedural provisions of the contract, was entitled to have the grievances of two employees allegedly discharged for unjust cause heard by arbitrators, in accordance with the contract, if they were not otherwise disposed of prior to invocation of the arbitration procedure. Holding that "the case does not present any aspect calling for an order to arbitrate", the Court added "There is no reason to assume, now that it has been determined . . . that there are existing rights under the contract, that the defendant will not honor such rights fully, throughout the remaining stages of the grievance procedure, including arbitration, if that stage is reached."<sup>19</sup>

<sup>19</sup> In a footnote the Court referred to "the issue argued and not decided of the enforceability of agreements to arbitrate", and cited, *inter alia*, the decision of the Court of Appeals in the case at bar, *Textile Workers Union v. American Thread*, 113 F. Supp. 137 and *Textile Workers of America CIO v. Lincoln Mills of Alabama*, 231 F(2d) 81 (C.A. 5).

The legislative development which supplements this course of judicial decision is found in bills introduced in the 1956 and 1957 sessions of the General Court to establish a uniform arbitration act. (Senate No. 265, 1956; House No. 2985 (1956), Ch. 90 of the Resolves of 1956; House No. 1378 (1957). The proposed legislation is modelled on the draft uniform arbitration statute approved by the Conference of the Commissions on Uniform state Laws and by the American Bar Association (Arbitration News No. 6, 1955, Special Arbitration Law Issue, American Arbitration Association.)

From the foregoing review of Massachusetts law, it is clear beyond cavil that an agreement to arbitrate future disputes contained in a collective bargaining agreement is valid and creates rights in the parties; that the state court will not enjoin an arbitration proceeding under such an agreement which is being conducted over the objection of one of the parties; and that a declaratory decree will be issued that the moving party is entitled to have grievances heard by arbitrators in accordance with the contract provisions. These rulings are accompanied by expressions by the Court of approval of equitable relief, in the circumstances; of arbitration provisions in contracts; and of a liberal interpretation of the statute. Short of an advisory opinion that such agreements are specifically enforceable, beyond the decisions necessitated by the facts in the cases before it, it is difficult to see how the Massachusetts court could have exhibited greater hospitality to the remedy of specific enforcement of arbitration clauses in collective bargaining contracts. The legislative policy, already expressed in the 1949 statute validating such agreements, and in the process of further development in proposed uniform legislation, points in the same direction.

Under these circumstances, there is clearly no merit in petitioners' arguments that "the common law rule was not changed by Section 11 of G. L. (Ter. Ed.) c. 150, enacted in 1949" (Br. p. 51) or its other attempts to construe the statute with respect to the enforcement of agreements to arbitrate as if the common law still governed. (Br. pp. 50-51)

In ascertaining the meaning of state law, this Court in *Bernhardt v. Polygraphic*, 350 U.S. 198 adverted to the fact that in that case there was no later authority than a 1910 decision of the Supreme Court of Vermont that an agreement to submit to arbitration would not be binding, that no fracture of the rules had appeared in subsequent decisions or *dicta*, and that no legislative movement is underway to change the result of those cases. And Mr. Justice Frankfurter, in his separate opinion, noted that "Law does change with times and circumstances and not merely through legislative reforms. It is also to be noted that law is not restricted to what is found in Law Reports or otherwise written. . . ." (*id* at pp. 209-210) In view of the national policy approving arbitration as a method of settling labor disputes (See p. 36 *supra*) the widespread and growing use of arbitration clauses in collective bargaining contracts (See p. 37 *supra*) and the shift in judicial attitude toward the enforcement of such clauses in collective bargaining disputes in Massachusetts and elsewhere, (see Frankfurter, J. in *Bernhardt v. Polygraphic* at pp. 209-210 and cases cited at pp. 34-35 *supra*) it is, we think, a fully warranted estimate that under Massachusetts law, if this case were brought in the state court, the agreement to arbitrate here in issue would be specifically enforced.

## Conclusion

Affirmance of the judgment of the Court below would go a long way toward making effective a useful device, in which all concerned—employers, unions, employees and the public—have an important interest. Legislation already on the books, whether the Arbitration Act, or the Labor Management Relations Act, or both, is an adequate basis for compelling specific performance of agreements to arbitrate, and the Norris La Guardia Act does not stand in the way. The constitutional problems which troubled some members of this Court in the *Westinghouse* case are not insurmountable and, indeed, are not even raised by petitioner in this case.

If federal law is to be applied, a desired uniformity will be achieved in the interpretation and enforcement of such agreements, many of which are "master agreements" covering labor relations matters between a single employer operating in many states and a single union representing the employees.

But even if state law is to be applied, under Section 301 or in diversity jurisdiction, such an application is more in accord with the national policy than a complete refusal to enforce the agreement. If this Court sanctions specific enforcement, it is probable that state courts will construe state law accordingly, as Massachusetts has done in recent decisions which express a deference to national policy, or that pending legislation, such as the uniform arbitration act, will be advanced as a method of furthering national policy, if a uniform federal law is not available. Contrariwise, if, despite the national policy, and a favorable Massachusetts source of law, this Court should decline to permit specific performance, there is a substantial likelihood that unions will refuse to include no-strike and arbitration clauses in collective bargaining contracts, on the unani-

swerable ground, that such clauses, being actionable, but not enforceable, represent a liability in damages and deprive them of the benefit in the arbitration clause which was the consideration for the no-strike clause.

Affirmance of the judgment of the Court below would remand this case presumably to the District Court, which would interpret Massachusetts law, if applicable; decide all questions relating to arbitrability; and hear the case on the merits. Thus, the only question before this Court is the essential and general question of whether, in the industrial society of the United States today, agreements to arbitrate in collective bargaining contracts in an industry affecting commerce are, under existing law, enforceable agreements in the federal courts. As to this question, we believe that there is only one answer.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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